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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 510

W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and SISTERS OF ST. FRANCIS, a Corporation,
Petitioners,

v.

A. J. SIMLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, and Sisters of St. Francis, a corporation, petitioners, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Tenth Circuit, entered October 12, 1954, dismissing petitioners' appeal in the above-entitled case.

Opinions Below.

The issues on this petition concern six decisions in litigation between respondent and petitioners in the Federal and State courts, as follows:

1. The District Court on March 5, 1953 dismissed the complaint on the ground that plaintiff (respondent here)

had no standing to sue for the relief asked—110 F. Supp. 761 (Appendix A, *infra,* p. i).

2. The Court of Appeals for the Tenth Circuit on November 9, 1953 reversed and remanded for further proceedings—210 F.2d 99 (App. A, *infra,* p. xii), *cert. den.* 347 U. S. 954, *reh. den.* 347 U. S. 973.

3. The District Court thereafter, without trial, on June 14, 1954 directed the entry of final judgment in favor of plaintiff—opinion unreported (App. A, *infra,* p. xxii).

4. The Court of Appeals, without opinion, on October 12, 1954 dismissed an appeal by defendants from the judgment in No. (3) above. It is this order of dismissal (App. A, *infra,* p. xxv) from which we now seek review.

5. The opinion of the Supreme Court of Oklahoma, dated March 30, 1954, in a companion case is reported as *In re Fletcher's Estate, Simler* v. *Wilson,* 269 P.2d 349 (App. A, *infra,* p. xxv).

6. A subsequent unreported opinion of the County Court of Oklahoma County in the related State court litigation was handed down on November 30, 1954 (App. A, *infra,* p. xxxix), and an additional statement clarifying that opinion was made by the same Court on December 9, 1954 (App. A, *infra,* p. xliv).

Jurisdiction.

The order sought to be reviewed was entered by the Court of Appeals on October 12, 1954 [No. (4) above]. There has been no rehearing or extension of time to petition for certiorari. Jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented.

The Oklahoma constitution and statutes contain certain prohibitions against corporate holdings of specified types of real estate, with appropriate penalties for violation. They also contain a saving clause which permits the holding of "such real estate as is necessary and proper" to carry on the corporate business.

The ultimate issue in this welter of State and Federal litigation is the validity, under these statutes, of a devise of Oklahoma realty to a charitable corporation qualified in Oklahoma by an Oklahoma resident under a will now in process of administration in the Oklahoma courts. Respondent Simler, sole heir of the testatrix, originally attacked in the State courts both the testamentary capacity of the testatrix and the capacity of the corporate devisee to take under the will. Subsequently, and while the State proceedings were still pending, he commenced in the Federal District Court, on the basis of diversity of citizenship, the present action for a declaratory judgment with respect to the succession to the real estate.

On the merits the ultimate questions are:

> (a) Whether the Oklahoma statutes prevent the petitioner Sisters from acquiring or holding the real estate devised to them.
>
> (b) If so, whether under Oklahoma law anyone other than the State has standing to assail their title.

These questions, we submit, should be left to the Oklahoma courts to settle in the litigation which was begun there before the present Federal suit, and which is still pending.

Upon the present petition the immediate questions are:

(1) Whether the Federal courts should decline to take jurisdiction to grant a declaratory judgment determining the succession to real estate under State law, or should stay their proceedings at least until those same questions of State law, previously raised in State probate proceedings, have been authoritatively determined in the State courts.

(2) Other considerations apart, whether the Federal courts in this case were warranted in summarily entering without trial judgment on the merits against petitioners solely on the basis of a finding as to respondent's standing to sue, and without hearing any evidence as to whether the property involved was "necessary and proper" for the conduct of the corporate business.

Statutes and Constitutional Provisions Involved.

The following provisions of Oklahoma law are involved in this litigation:

Oklahoma Constitution, Art. XXII, Sec. 2.

Oklahoma Statutes 1951, Title 18, Secs. 1.20-.25, 543, 581, 588-89; Title 20, Secs. 271, 275; Title 58, Secs. 1, 631-32.

The pertinent provisions of the foregoing sections are set forth in Appendix B, *infra*. We do not believe that their extended consideration is necessary on this petition. The merits of the litigation turn primarily on the application of provisions of the Oklahoma Constitution (Art. XXII, Sec. 2) and Statutes (Title 18, Sec. 1.20) which prohibit any corporation from holding real estate outside of any incorporated city or town, except

"Such real estate as is necessary and proper for carrying on the business for which any corporation has been lawfully formed or domesticated in this State."

Statement of the Case.

For an understanding of the issues here presented, a chronological analysis of the proceedings in the Federal and State courts is essential.

Mrs. Birdine Fletcher, an elderly childless widow of the Catholic faith, died in Oklahoma City on July 13, 1952. In addition to about $120,000 of personalty, her estate included a tract of oil-producing land located in Caddo County, Oklahoma, valued for probate purposes at $150,000 (R. 2, 70-74).

Mrs. Fletcher's sole heir was her brother, the respondent A. J. Simler. Some two years before her death, he had for a brief period shared her residence in Oklahoma City. Difficulties had arisen between them, and Mr. Simler went so far as to make an effort (which was ultimately unsuccessful) to have his sister declared incompetent. (See opinion of the Supreme Court of Oklahoma, 269 P.2d at 353-54, App. A, *infra,* at xxxii-xxxiii.)

Their relationship not unnaturally became somewhat embittered by this episode, and when Mrs. Fletcher came to make her will she cut him off with a bequest of $1.00 "and no more". After various cash bequests to charities and individuals, she left her residuary estate in equal shares to a hospital in Oklahoma and to a hospital and a convent in Missouri, all three of which are owned and operated by the petitioner Sisters of St. Francis. The Sisters are a charitable corporation, organized under the laws of Missouri and qualified in Oklahoma (R. 1-2, 7, 11).

A few days after Mrs. Fletcher's death in July, 1952 her will was offered for probate in the County Court of Oklahoma County. Respondent Simler filed objections on the ground that his sister was incompetent and that her will had been procured by undue influence (R. 16-17).

Subsequently, on September 30, 1952, Simler filed in the County Court an additional objection to admission of the will to probate, based on a claim that the residuary devisees had no capacity to receive the devises made (R. 18).

On October 2, 1952 the County Court overruled the objections based on incompetency and undue influence, and admitted the will to probate. The following day Simler appealed to the District Court of Oklahoma County (R. 21). Under Oklahoma law, this gave the right to a trial *de novo* in the State District Court (Okla. Stat. 1951, Title 20, Sec. 275, App. B, *infra*, p. vii).

With matters in this posture, and with questions as to the validity of the will and the capacity of the devisees to take under Oklahoma law still in litigation in the State courts, Simler on October 16, 1952 commenced the present action in the United States District Court. Jurisdiction was based on diversity of citizenship, Simler being a citizen of Arkansas and defendants being respectively a citizen of Oklahoma and a Missouri Corporation qualified in Oklahoma. His complaint alleged that under Oklahoma law the residuary devisees had no capacity to take or hold the real estate, and asked for a declaratory judgment of intestacy with respect thereto (R. 1-8, 4).

The defendants in the Federal action were the present petitioners: Mrs. Fletcher's executor and the residuary devisee Sisters of St. Francis. On November 6, 1952 they moved to dismiss the complaint on the ground of the pendency of the State court action. This motion was denied

without opinion on December 22, 1952 and defendants were granted leave to answer (R. 10-15, 27).

Defendants' answer, filed December 23, 1952, admitted allegations as to the names, residence and status of the parties; that the amount in controversy exceeded $3,000; that plaintiff Simler was the sole surviving heir of the deceased; that the deceased had died owning the real property in controversy; that the will had been admitted to probate in the County Court and by its terms devised the real property in controversy to the Sisters. The answer denied all other allegations of the complaint and set up as an affirmative defense that plaintiff was without standing to maintain the action, since the claim of corporate incapacity could be raised only by the State (R. 54-57).

On January 20, 1953 the State of Oklahoma, by the County Attorney of Caddo County, moved to intervene in the Federal action, asserting that the devise of realty under Mrs. Fletcher's will was void under Oklahoma law because of incapacity in the corporate devisee, and praying that the real estate be escheated to the State (pp. 21-24 in Print of Record in No. 677, October Term 1953).

On March 5, 1953 the matter came on for hearing in the Federal District Court on the complaint and answer (including the affirmative defense above mentioned as to plaintiff's lack of standing to sue), and upon the motion of the State to intervene. The District Court handed down an opinion (110 F. Supp. 761, App. A, *infra*, p. i) in which, after discussion of the authorities and statutes, it held (110 F. Supp. at 767, App. A, *infra*, pp. x-xi):

> "It is the opinion of this court that even though a testatrix devises real estate to a religious corporation which in fact is not necessary and proper for the carrying on of its business that such a devise is not void but voidable; only the State can question the right of the corporation to hold, and even then the

State must bear the burden of proof in showing such real estate is not 'reasonably necessary, for the business and objects of the said corporation'.

Inasmuch as the plaintiff is not the proper party to question the defendant corporation's right to benefit from the devise in question, this action will be dismissed. It necessarily follows that the application to intervene is hereby overruled, as there is no pending action subject to intervention."

Simler thereupon appealed to the Court of Appeals. The State did not.*

Meanwhile the *State* District Court, after nine days of trial, on January 27, 1953 affirmed the judgment of the County Court and rejected Simler's objections to the probate of the will based on incapacity of the testatrix and undue influence. Simler appealed from this affirmance to the Supreme Court of Oklahoma.

While the case was pending undetermined in the Supreme Court of Oklahoma, the Court of Appeals for the Tenth Circuit on November 9, 1953 handed down its opinion (210 F.2d 99, App. A, *infra,* p. xii) reversing the decision of the Federal District Court.

The Court of Appeals first rejected the defense argument that the subject matter of the action was within the exclusive jurisdiction of the State probate courts (210 F. 2d at 101-02, App. A, *infra,* pp. xiv-xvi). On the question whether Simler had any standing to assert the corporate incapacity of the devisee, or whether that incapacity could

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* The failure of the State to take further part in the proceedings may perhaps be accounted for by the fact that the provisions formerly contained in Okla. Stat. 1931 Sec. 1636 for escheat to the State of real estate held by corporations in violation of Art. XXII, Sec. 2 were repealed by Oklahoma Laws 1937 Chap. 46, Sec. 14. The Oklahoma laws now provide instead for monetary penalties to be paid into the Permanent School Fund of the State. Title 18, Secs. 1.23-1.25 (App. B, *infra,* pp. ii-v; see also p. 19, *infra*).

be asserted only by the State, the Court of Appeals said (210 F.2d at 102, App. A, *infra*, p. xvi):

> "There is irreconcilable conflict among the decided cases * * *."

Notwithstanding language in several Oklahoma cases which would indicate a contrary conclusion (cf. *infra*, p. 18), the Court of Appeals thereupon proceeded to hold that Simler *did* have standing to assert corporate incapacity and to maintain the suit. In reaching this result the Court of Appeals disregarded completely the question (on which there had been no proof either way) as to whether the devise fell within the specific statutory provision permitting the holding of such real estate "as is necessary and proper" for carrying out the corporate business, and declared that at the date of Mrs. Fletcher's death (210 F.2d at 104, App. A, *infra*, p. xix):

> "* * * the corporate residuary legatee under her will was expressly and utterly forbidden by the Constitution and the statute to take, acquire, hold or own the land in controversy. And the land not being legally and effectively devised, no title vested in the devisees. Instead, title immediately passed under the law of descent and vested in the appellant as the sole heir at law of the decedent [citing five cases, *all from states other than Oklahoma*] * * *"

The opinion concluded with this direction (210 F.2d at 105, App. A, *infra*, p. xxi):

> "The judgment is reversed and the cause remanded for further proceedings not in conflict with the views herein expressed."

The executor and the Sisters filed a petition for rehearing, requesting a stay until the relevant State issues could

be passed upon by the State courts in the probate proceedings then pending before them. This petition was denied (pp. 38-42 in Print of Record in No. 677, October Term 1953). On April 26, 1954 this Court denied certiorari, 347 U. S. 954.*

Meanwhile, on March 30, 1954 the Supreme Court of Oklahoma, in a long and careful opinion, had affirmed the judgment of the lower State courts sustaining the validity of the will and rejecting Simler's objections thereto. *In re Fletcher's Estate, Simler* v. *Wilson,* 269 P.2d 349 (App. A, *infra,* p. xxv). The probate proceedings then went back to the County Court for settlement of the executor's account and a final decree of distribution.

On May 3, 1954, Simler, upon the mandate of the Court of Appeals, moved in the Federal District Court for the entry of final judgment in his favor (R. 41). The executor and the Sisters, in opposition, cited the statutory provisions permitting the holding of real estate "necessary and proper for carrying out the corporate business", and asserted (R. 46):

> "A trial must therefore be had upon the merits to determine whether or not the defendant corporation, Sisters of St. Francis, comes within this exception".

They also moved for a stay of proceedings in the Federal Court until the question of the Sisters' capacity

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* In denying certiorari, this Court may have assumed that under the mandate of the Court of Appeals the District Court would proceed to a trial on the merits, and hence that the granting of certiorari at that stage would lead to a premature piecemeal review of the litigation. *Cf. Hamilton-Brown Shoe Co.* v. *Wolf Bros.,* 240 U. S. 251, 257-58 (1916). Of course the denial of certiorari was not equivalent to an affirmance of the order of the Court of Appeals and does not foreclose from consideration on the instant petition either the issues involved on the earlier petition or those which have subsequently arisen. *Id.* at 258-59.

to take had been settled under State law in the State courts, citing *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942) (R. 49).

Simler countered with a motion to enjoin the executor and the Sisters from any further litigation in the State courts (R. 66).

On June 14, 1954, the Federal District Court handed down its opinion on the foregoing motions (App. A, *infra*, p. xxii).

In this opinion the District Judge pointed out that when the matter was first before him he had considered *only* the issue of the standing of the plaintiff to maintain the action, and that he had not considered or ruled upon any other issues dealing with the case on its merits.

He nevertheless construed the opinion and mandate of the Court of Appeals as holding that as a matter of law the plaintiff was entitled to final judgment in his favor, and to a ruling that the title to the realty vested immediately in him upon the death of Mrs. Fletcher. With obvious reluctance the District Judge therefore proceeded to enter final judgment for the plaintiff and to deny defendants' motion for a stay. At the same time he denied the cross-motion of Simler for an injunction against further litigation in the State courts (App. A, *infra*, pp. xxiii-xxiv; R. 100).

Defendants moved for a new trial, again insisting upon their right to introduce evidence in defense, particularly upon the issue as to whether the defendant Sisters could bring themselves within the statutory exception with respect to real estate "necessary and proper" in their corporate business. This motion was denied (R. 104, 111, 120). A separate motion of defendants that the Federal District Court withhold its final order pending a decision in the State litigation was likewise denied (R. 115, 122).

Defendants thereupon appealed to the Court of Appeals. Simler likewise appealed from the denial of his cross-motion for an injunction (R. 132). He also moved to dismiss the appeal of the defendants as frivolous.

On October 12, 1954, the Court of Appeals, without opinion, granted Simler's motion and dismissed the present petitioners' appeal (App. A, *infra*, p. xxv). It made no disposition of Simler's cross-appeal, which was subsequently withdrawn.

This dismissal of our appeal by the Court of Appeals in effect affirmed, and left standing against the present petitioners, the final judgment entered against them on the merits by the District Court without trial. It is from this order of dismissal by the Court of Appeals that we now seek certiorari.

Subsequently, the County Court, on remand from the Supreme Court of Oklahoma, proceeded to hear the probate proceedings on settlement of the executor's account and his petition for a final decree of distribution. On November 30, 1954, the County Court handed down its decision (App. A, *infra*, p. xxxix), and on December 9, 1954, entered a final decree of distribution of the estate.

In its decision of November 30, the County Court leaves open the question as to whether the Federal court had jurisdiction and whether the County Court was bound by its judgment, and states that the "crux of the case" is the very point on which the Federal courts had refused to hear defendants, namely whether the land was "necessary and proper for the purposes for which the instant corporation was formed". The County Court, on the basis of the testimony offered and its interpretation of the constitutional and statutory provisions involved, concludes that the land is in fact not reasonably necessary for the business of the Sisters (App. A, *infra*, pp. xli-xlii).

Other questions, which the Federal courts have likewise disregarded by their summary disposition of the whole case solely on the issue of Simler's standing to sue, are left open by the County Court for determination by the higher State courts (App. A, *infra*, p. xlii):

> "There is the query as to whether this court could sever the mineral rights from the naked land, especially since the land was oil producing at the time of death of the testatrix; or could hold that the oil when brought to the surface was personalty; and therefore, the question of whether the Court could distribute the mineral rights and the oil when produced to the corporation and the naked legal title to the heir at law, subject to incidental rights to use of the surface in the corporation."

Moreover, the County Court also held that the taxes and debts of the estate and the costs of its administration, and also the legacies, are to be paid out of the land which the Federal District Court has declared vested in Simler immediately upon Mrs. Fletcher's death (App. A, *infra*, pp. xliii-xliv). The final decree ordered such taxes, debts and costs in the amount of $58,701, as well as legacies of $69,009, to be paid from that land, and also that a further sum of $25,000 be reserved from that land to pay any undetermined obligations of the estate.

Both the present petitioner Sisters of St. Francis and the present respondent Simler have appealed from this decision of the Oklahoma County Court to the *State* District Court, where the entire matter will be tried *de novo*.

REASONS FOR GRANTING THE WRIT.

I.

The questions of State law herein should be left for decision by the State courts.

The exercise by the Federal courts in this litigation of jurisdiction to decide important issues of State law previously raised in the State probate proceedings was clearly erroneous and in conflict with decisions of this Court, *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491 (1942); *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942), and with those of other Circuits, *P. Beiersdorf & Co., Inc.* v. *McGohey*, 187 F.2d 14 (2nd Cir. 1951); *Mottolese* v. *Kaufman*, 176 F.2d 301 (2nd Cir. 1949); *Green* v. *Phillips Petroleum Co.*, 119 F.2d 466 (8th Cir.), *cert. den.* 314 U. S. 637 (1941); *Butler* v. *Judge of the United States District Court*, 116 F.2d 1013 (9th Cir. 1941). In the *Brillhart* case, this Court said (316 U. S. at 494-95):

> "Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction. The petitioner's motion to dismiss the bill was addressed to the discretion of the court. *Aetna Casualty Co.* v. *Quarles*, 92 F. 2d 321; *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. 2d 514; *American Automobile Ins. Co.* v. *Freundt*, 103 F. 2d 613; see Note, 51 Yale L. J. 511. *Compare Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 422-23; *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377. The motion rested upon the claim that, since another proceeding was pending in a state court in which all the matters in controversy between the parties could be fully adjudicated, a

declaratory judgment in the federal court was unwarranted. The correctness of this claim was certainly relevant in determining whether the District Court should assume jurisdiction and proceed to determine the rights of the parties. Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided."

Under the foregoing decisions, the lower Federal courts in this case, we submit, should have granted petitioners' repeated requests for a stay of the Federal declaratory judgment action pending a decision of the same issues in the State courts. Respondent Simler had himself chosen the State court as the appropriate forum when he filed in the probate proceedings, some two weeks *before* starting his Federal action, his objection based on the alleged incapacity of the Sisters to take their devise. "Gratuitous interference with the orderly and comprehensive disposition of a State court litigation" is bad enough when it is created by the conflicting choices of opposing litigants. When it is deliberately created by the conflicting choices of a single litigant, it is intolerable. We submit that this Court should now grant certiorari so that the important questions of State law involved in this case may be left where they belong, for determination by the State courts in the prior State litigation still pending.

II.

Entry of judgment on the merits without trial deprived petitioners of due process of law.

The entry of final judgment against petitioners on the merits by the Federal courts solely on the basis of the decision that respondent had standing to sue was a denial to petitioners of due process of law, and constituted such a departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision. Defendants were denied any opportunity to be heard or to adduce proof on the issue subsequently characterized by the County Court as the "crux of the case" —namely whether the land was "necessary and proper for carrying on the business" of the Sisters.

In this connection we adopt the following language appearing in *Simler's* brief in the Court of Appeals on his appeal on the issue of his standing to sue:

> "How could the trial court determine whether this conveyance was void or not until he had heard the evidence presented by these parties to show by facts and circumstances whether or not the property was necessary and proper for carrying on the business for which the corporation was formed? * * *" (Brief of Appellant, p. 8, filed July 20, 1954 in *Simler* v. *Wilson,* No. 4656.)

The summary treatment of the case by the Federal courts also foreclosed from any consideration whatsoever other subsidiary questions, such as the following:

1. **Severability of mining rights.** The principal value of the land here involved arises from the fact that it is already in production of subsurface oil, yielding current

royalty revenues in excess of $2,000 per month (R. 2). The value of the surface, apart from the oil rights, is comparatively negligible. The mineral rights to the oil might well be severed from the land itself and held not within the inhibitions of Oklahoma law against corporate ownership of real estate, as was done in *Texas Co.* v. *State ex rel. Coryell,* 198 Okla. 565, 575-76, 180 P.2d. 631, 642 (1947).

The opinion of the County Court left it to a higher court to determine whether by this route or by treating the oil when brought to the surface as personalty, the mineral rights and the oil when produced could be distributed to the Sisters, leaving Simler with legal title to the land. One thing quite certain under Mrs. Fletcher's will is that she did not intend her brother to enjoy her bounty, for reasons indicated in the opinion of the Supreme Court of Oklahoma (269 P.2d. at 353-54, App. A, *infra,* pp. xxxii-xxxiv). It may well be that in order to carry out Mrs. Fletcher's plain intention, the Oklahoma courts in the pending probate proceedings might thus sever the mineral rights from the land. This question should be left open for consideration by the courts below, preferably by the Oklahoma State courts.

2. **Provisions of Oklahoma Law permitting religious corporations to hold real estate.** In addition to the provisions of Art. XXII, Sec. 2, and Title 18, Sec. 1.20, relating to corporate holdings of rural real estate, the Oklahoma laws contain a number of provisions granting to religious corporations broad powers to take and hold real estate (App. B, *infra,* pp. vi-vii). The summary procedure of the Federal courts in this litigation prevented any consideration of the effect of these latter provisions of Oklahoma law, a matter which should likewise be left to the State courts.

3. **Subjection to payment of debts and legacies.** Although the County Court, like the Federal courts, decreed the disputed land to Simler, it further held that the debts and legacies of the estate, amounting to more than $127,000, are to be paid out of that land. The judgment of the Federal courts vesting title in Simler as of the testatrix's death was not so qualified, and of course the Federal courts did not consider this point. So long as the Federal judgment stands, there is every prospect of further conflict between the State and Federal jurisdictions in this regard. Simler has in fact on December 17, 1954, served a supplemental motion in the Federal District Court to enjoin the Sisters from prosecuting further any litigation in the State courts attacking his title to the land or the income therefrom since the date of Mrs. Fletcher's death.

III.

The decision below is probably not in accord with Oklahoma law.

As indicated in the opinion of the Court of Appeals, the courts of different States are sharply split as to whether anyone but the State has standing to challenge unlawful corporate holdings of real estate (210 F.2d at 102-03, and cases there cited, App. A, *infra,* pp. xvi-xvii). The view of the Oklahoma Supreme Court, contrary to that of the Federal Court of Appeals, has been that in Oklahoma only the State may make such an attack. *Texas Co.* v. *State ex rel. Coryell,* 198 Okla. 565, 570-71, 180 P.2d 631, 637 (1947); *Brown* v. *Capps,* 164 Okla. 91, 22 P.2d 1008 (1933). In the latter case the Court said (164 Okla. at 93, 22 P. 2d at 1010):

> "The trial court found that plaintiff could not raise the question of the constitutional inhibition of the

> defendants under section 2, article 22, of the Constitution, to hold lands, as this question could only be raised by the state. This question is also well settled in this jurisdiction, contrary to the contention of plaintiff. In the case of Union Trust Company *v.* Hendrickson, 69 Okl. 277, 172 P. 440, it is said: 'The state alone can question as ultra vires the acquiring title to and holding real property by a corporation.' "

Moreover, the Oklahoma Statutes, Title 18, Secs. 1.23-.25 (App. B, *infra*, pp. ii-v), now provide a specific statutory proceeding for the recovery by the State of monetary penalties at enumerated rates for each year during which a corporation illegally holds rural real estate (see footnote, p. 8, *supra*). These penalties further support the view that the exclusive remedy is in the State.

The decision below likewise contravenes the established rule in Oklahoma that a corporation may lawfully hold rural real estate necessary and proper in the business for which it was chartered and that the burden is on one attacking such a holding under Art. XXII, Sec. 2, of the State Constitution to establish that the holding is not thus necessary and proper. *Texas Co.* v. *State ex rel. Coryell, supra,* 198 Okla. at 567-68, 571-72, 180 P.2d at 634, 638-39.

Furthermore, the decision below creates a serious doubt as to the title of any charitable corporation in Oklahoma* to real estate outside of municipalities. Judgment on the merits was entered solely on the basis of the statement of the Court of Appeals on the first appeal that the "* * * corporate residuary legatee under her will was expressly

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* The impact of the instant case is not, however, limited to Oklahoma, since other States have similar statutory restrictions on corporate holdings of real estate. See, *e. g.*: Kentucky Rev. Stat. Sec. 271.145(1); Michigan Const. Art. XII, Sec. 5; Missouri Const. Art. XI, Sec. 5; Montana Rev. Codes Sec. 15-810; New Hampshire Rev. Laws Chap. 275, Sec. 7.

and utterly forbidden by the constitution and the statute to take, acquire, hold, or own the land in controversy * * *" (210 F.2d at 104, App. A, *infra*, p. xix). The statutory exception for land necessary or proper for carrying on the corporate business, as well as any other doctrines of State law by which title to such land might be validated, were all disregarded or put aside by the Federal courts.

Summary and Conclusion.

In this litigation the error of the Federal courts below in denying petitioners' requests for a stay pending the decision of the State courts has been compounded by the summary disposition of the case, which without hearing or trial foreclosed important questions of State law from any consideration. The resulting decision has a far-reaching effect both on the procedure to be followed by the Federal courts in declaratory judgment actions involving important issues purely of State law previously raised in State probate proceedings, and also on the title to real estate of charitable corporations in Oklahoma and elsewhere. We submit, therefore, that a compelling case is presented for the exercise of this Court's certiorari jurisdiction.

If certiorari is granted, we shall ask this Court to do one of three things:

> (a) To set aside the judgment of the District Court and direct that the Federal action be dismissed without prejudice to the right of the parties to litigate the same matters in the State courts, *or*
>
> (b) To set aside the judgment of the District Court and direct that further proceedings in the Federal action be stayed pending a final determination of the questions of State law in the State probate proceedings, *or*

(c) To set aside the judgment of the Federal District Court and direct that Court to proceed to a trial on the merits.

Dated: December 31, 1954.

Respectfully submitted,

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Appendix A.

Opinions and Order Below.

Opinion of the United States District Court, Western District of Oklahoma, Dated March 5, 1953.

(Reported 110 F. Supp. 761).

WALLACE, District Judge.

The plaintiff, A. J. Simler, a resident of Arkansas, brings this action, under the Declaratory Judgment Act,[1] against the Sisters of St. Francis, a Missouri Corporation, the residuary legatee in the "Will" of Birdine Fletcher, and against W. H. Wilson, executor of this Will. The plaintiff requests this court to construe this Will and to judicially determine whether or not under Oklahoma law the defendant religious corporation can receive and hold certain real estate of the decedent which is situate outside the incorporated limits of any city or town.

The State, through the County Attorney of Caddo County, filed its application to intervene.[2]

The first question to be determined is whether or not this court has jurisdiction over the original parties to the suit.

Although the Will in question is now being probated in the state court doubtless this court has the authority to *construe* the provisions of the Will.

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[1] 28 U. S. C. A. §2201 provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." Also, see §2202.

[2] Fed. Rules Civ. Proc. rule 24, 28 U. S. C. A.

Opinion of the United States District Court, Western District of Oklahoma, Dated March 5, 1953.

In *Ferguson* v. *Patterson*[3] the court held that where an independent action for construction of a will could have been maintained in a court of general jurisdiction in the State of Oklahoma, and diversity of citizenship of parties existed and requisite jurisdictional amount was involved, the federal district court has jurisdiction to hear and determine action to construe the will.

However, the primary problem now before us is whether under the Oklahoma law the plaintiff, a brother of the testatrix, can challenge the right of the defendant religious corporation to take and hold such real estate.

In 13 Am. Jur. § 782 it is said:

> "The decisions upon the right of the heirs or next of kin of a testator to attack a devise to a corporation on account of its incapacity to take and hold real estate are conflicting. *The better and majority rule is that the question of the legal capacity of a corporation to take a devise of realty in excess of the amount prescribed by its charter or by reason of its incapacity to take and hold real estate, no restrictions on the power to devise being involved, cannot be raised collaterally by private persons, such as the testator's heirs or next of kin, but can be raised only*

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[3] 10 Cir., 1951, 191 F. 2d 584.

It should be observed that the Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts, but merely creates a new form of procedure by which declaratory judgments may be rendered by federal courts in exercise of their jurisdiction to decide cases or controversies, both at law and in equity, which judiciary acts have already conferred.

Logically, in exercising its jurisdiction under the Declaratory Judgment Act, the court has the duty to ascertain whether the questions in controversy between the parties to the federal court suit can better be settled in proceedings pending in the state court. Such a question should be resolved by a determination of whether there is such a plain, adequate and speedy remedy afforded the federal court plaintiff in a pending state court action that a declaratory judgment will serve no useful purpose. *Guardian Life Ins. Co. of America* v. *Kortz*, 10 Cir., 1945, 151 F. 2d 582.

by the state in a direct proceeding." (Emphasis supplied.)

The majority and minority rules regarding the "right of heirs or next of kin to attack devise to corporation on ground of its incapacity to take" are analyzed in 69 A. L. R. 1359. There it is stated:

> "The rule adopted in a majority of jurisdictions in the United States is that the question of the legal capacity of a corporation to take a devise of realty cannot be raised collaterally by the testator's heirs or next of kin, but can be raised only by the state in a direct proceeding.'"[4]

It is further stated:

> "In several jurisdictions, however, it is held that the heirs or next of kin of the testator may attack the validity of a devise to a corporation on the ground of its incapacity to take.'"[5]

It is incumbent upon this court to determine which rule Oklahoma follows inasmuch as we have no recorded cases wherein the Oklahoma Supreme Court has passed on this specific question.

The underlying difference in the rationale of the two views is aptly illustrated in the Kansas case of *Kennett* v. *Kidd*.[6] In holding that an heir at law had the right to

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[4] The annotator lists Delaware, Illinois, Maine, Maryland, Massachusetts, Mississippi, Pennsylvania, Tennessee and Utah as adherents to the majority rule. However, as to Illinois *cf. St. Peter's Roman Catholic Congregation* v. *Germain*, 104 Ill. 440.

[5] The annotator lists Kansas, Kentucky, New Jersey, New York, North Carolina, Rhode Island and Texas as followers of the minority rule.

[6] 1912, 87 Kan. 652, 125 P. 36, 44 L. R. A., N. S., 544; judgment affirmed on rehearing at 1913, 89 Kan. 4, 130 P. 691, 44 L. R. A., N. S., 549.

dispute a corporation's power to take title to devised realty the court said:[7]

> "As a general rule, when corporations do acts or attempt to hold property ultra vires, private parties may not be heard to complain for the reason that corporations, being the creatures of the state and subject to its sovereign will, are to be corrected only by the state. The rule more frequently applies when the assumed powers render the conveyance voidable and not absolutely void. Approaching the matter from the point of reason and logic, we have this situation: *The law directs how property undisposed of according to law shall descend at the death of the owner. The law prohibits the devisee in question from taking and holding the property sought to be devised by the testator. Such conveyance is not voidable but void; therefore the persons whom the law has selected as the proper heirs to this property have a right to object to being deprived thereof, and have the right to assert their statutory claim in opposition to that of the camp* [corporation] *which has no legal basis whatever.*" (Emphasis and insert supplied.)

Thus, it is clearly depicted that whether or not an heir, such as the plaintiff in this action, can maintain a suit of this nature, is directly dependent upon whether such devise under the governing substantive law is deemed to be *void* or merely *voidable*. If such a devise is deemed void, unquestionably under the logic just quoted an heir should be permitted to question a corporation's right to take title;[8]

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[7] 125 P. 36, 39.

[8] If the statute makes the conveyance absolutely void such conveyance would be subject to being attacked collaterally. This principle is enunciated in *Hanna* v. *Kelsey Realty Co.*, 1911, 145 Wis. 276, 129 N. W. 1080, 33 L. R. A., N. S., 355 wherein the court said: "Where a deed of land is made to a foreign corporation which has

if such a devise is merely voidable then the state alone can bring suit.

The pertinent section of the Oklahoma Constitution provides:[9]

> "No corporation shall be created or licensed in this State for the purpose of buying, acquiring, trading, or dealing in real estate other than real estate located in incorporated cities and towns and as additions thereto; nor shall any corporation doing business in this State buy, acquire, trade, or deal in real estate for any purpose except such as may be located in such towns and cities and as additions to such towns and cities, and further *except such as shall be necessary and proper for carrying on the business for which it was chartered or licensed* • • •." (Emphasis supplied.)

An examination of the cases construing this particular provision unmistakably indicates that insofar as this constitutional prohibition is concerned any transfer of title inter vivos in violation thereof is not void, but is voidable, and then only upon a proper action brought by the state.[10]

In *Texas Co.* v. *State ex rel. Coryell, County Atty., Creek County* the Oklahoma Supreme Court said:[11]

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not complied with St. 1898 §1770b, prohibiting a foreign corporation from transacting business, or acquiring, holding, or disposing of property in the state without first complying with the statute, and declaring that every contract relating to property entered into before a compliance with the law shall be 'wholly void,' the deed is a nullity and a prior mortgagee of the vendor under an unrecorded mortgage may show the fact of noncompliance and take the benefit thereof; the words 'wholly void' meaning absolutely void and a nullity." Cf. 19 C. J. S., Corporations, §1113.

[9] Art. XXII, §2, Const. of State of Okla.

[10] See *Kurz* v. *Farmers United Co-operative Pool*, 1947, 199 Okl. 224, 184 P. 2d 790. See 19 C. J. S., Corporations, §1112.

[11] 1947, 198 Okl. 565, 180 P. 2d 631, 637.

Opinion of the United States District Court, Western District of Oklahoma, Dated March 5, 1953.

"The effect of the constitutional limitation and the language of the statute making unlawful the acquiring of land in violation of such limitation is to make voidable and not void conveyances made to corporations in contravention thereof, and voidable only in a direct proceeding by the State. In recognition of this rule which is of general acceptation * * * this court * * * quotes with approval from Louisville School Board et al. v. King, 127 Ky. 824, 107 S. W. 2d 247, 15 L. R. A., N. S., 379 the following statement: ' "The general rule is that, although a corporation may be disabled or forbidden by the organic or statute law of a state from holding land except for particular purposes, or from holding land beyond a prescribed limit or quantity, yet, if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the state alone; and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the state for that purpose; and this rule prevents the title of the corporation from being assailed by its grantor or grantee." ' "

Accordingly, it was held in *Local Inv. Co.* v. *Humes*, that:[12]

"* * * it appears to be well settled that a conveyance to a corporation in violation of said section of the Constitution [§ 2, Art. 22] is not absolutely void, but merely voidable in its ordinary aspects. [Citing cases.]" (Insert supplied.)

Also, in *Union Trust Co.* v. *Hendrickson*[13] the court said:

"The law seems to be well established by the great weight of authority that, if a corporation is

[12] 1915, 51 Okl. 251, 151 P. 878, 879.

[13] 1918, 69 Okl. 277, 172 P. 440, 441.

not authorized to acquire real estate except in a limited amount for prescribed purposes, the acquisition of additional property cannot be questioned by a private individual, but can only be questioned by the state. [Citing cases.]"

In an Oklahoma case involving the taking of title by a County this same principle was applied:[14]

"The mere fact that the county may have taken a deed conveying to it the fee-simple title for a purpose not authorized by law, does not render the deed absolutely void. Neither the parties who conveyed the land, nor their heirs can complain or maintain an action to set aside the deed, or recover the land; the state alone can, as a general rule, complain, and it alone can maintain an action to divest the county of title thereto. * * * The Supreme Court of the United States in the case of Reynolds v. First Nat. Bank, 112 U. S. 405, 5 S. Ct. 213, 217, 28 L. Ed. 733, held: 'Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable. The sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.' * * *"

In *Brown* v. *Capps*, the court said:[15]

"* * * The trial court found that plaintiff could not raise the question of the constitutional inhibition

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[14] *Benedict* v. *Board of Com'rs of Lincoln County*, 1932, 161 Okl. 50, 17 P. 2d 454, 455.

[15] 1933, 164 Okl. 91, 22 P. 2d 1008, 1010.

In *State ex rel. Short, Atty. Gen.* v. *Benevolent Inv. & Relief Ass'n*, 1925, 107 Okl. 228, 232 P. 35, 37 A. L. R. 190 the court held that a conveyance of real estate by the owner to a corporation duly organized under the laws of the territory of Oklahoma, or of the State of Oklahoma, may vest title to such real estate in such corporation, although the acquiring or holding of such real estate be beyond the power granted to such corporation by its charter.

> of the defendants under section 2, article 22, of the Constitution, to hold lands, as this question could only be raised by the state. This question is also well settled in this jurisdiction, contrary to the contention of plaintiff. * * *"

In the case at bar, in addition to the constitutional provision limiting a corporation's right to hold, we must also consider the effect of section 543 of Title 18, Okl. Stat. Ann., which pertains specifically to religious, educational and benevolent corporations. This section provides:

> "All such corporations may hold all the property of the association owned prior to incorporation, as well as that acquired thereafter in any manner and transact all business relative thereto; *but no such corporation shall own or hold more real property than may be reasonably necessary for the business and objects of the said association.*" (Emphasis supplied.)

In the only reported case construing this statute the court was not compelled to pass upon the question now before us inasmuch as the court disposed of the case on its merits holding that the finding of the trial court that such property was reasonably necessary for the objects of the corporation and for carrying on the business for which it was chartered, as required by the constitutional and statutory provisions, was not against the clear weight of the evidence.[16]

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[16] *Pelter* v. *Sacred Heart Catholic Church, Inc.*, 1939, 186 Okl. 45, 96 P. 2d 24.

At page 25 of 96 P. 2d the court said: "The church takes the position at the outset that the residuary legatee is not entitled to challenge the right of the corporation either to take by devise, or to hold the particular property involved, but contends that it is a matter that the state alone can raise. But under the view we take of the case we do not deem it necessary to decide, or to intimate an opinion on, this matter."

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This court sees no logical basis upon which to distinguish a passing of title inter vivos from a passing of title through devise insofar as the character of the title transferred is concerned. The law conclusively establishes that conveyances pass at least a voidable title;[17] by analogy it seems inescapable that a devise under a valid will also transfers at least a voidable title; this places Oklahoma in harmony with the rule recognized in a majority of the states.

The plaintiff points out that the Business Corporation Act of 1947 must not be overlooked in determining the force to be given these previous decisions.[18]

The court has carefully studied the 1947 Act and finds nothing in it which alters the substantive principle just discussed.

The legislature not only failed to repeal the special statutes pertaining to religious corporations,[19] but by implication[20] left the law undisturbed insofar as the question in the case at bar is concerned.

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[17] This is further emphasized by the fact that although a corporation may have acquired real estate in such a manner as to render it subject to be escheated to the state by a proper action begun for that purpose, yet if such corporation shall, prior to the commencement of such proceeding to escheat, make a bona fide sale or conveyance of said real estate for value, the purchaser at such sale will take good title thereto. *State ex rel. Short, Atty. Gen.* v. *Benevolent Inv. & Relief Ass'n*, footnote 15 *supra*. Accord, *McMillan* v. *Pawnee Petroleum Corporation*, 1931, 151 Okl. 4, 1 P. 2d 775.

[18] 18 Okl. Stat. Ann. §§ 1.1 to 1.250.

[19] 18 Okl. Stat. Ann. § 541 *et seq.*

[20] The following Draftsman's Note appears in connection with section 1.19(6) of the 1947 Act relating to the power of a domestic corporation to acquire real estate by purchase, will or otherwise:

"(6) The limitations (sic) in the Constitution was inserted because of the rigid provisions in Art. XXII § 2 thereof. We thought of leaving this off and annexing a clause similar to the one used by Illinois and Pennsylvania at the end of the respective sub-sections. But Const. Art. XXII, § 2, is so broad that trouble might be experienced thereby. It is thought to be better to specify the constitutional limitation and leave it to the courts."

Opinion of the United States District Court, Western District of Oklahoma, Dated March 5, 1953.

Section 1.20 of the 1947 Act provides:

> "a. No corporation of any sort, whether coming within the general scope of this Act or not, shall, except as herein provided, own, hold, or take any real estate located in this State outside of any incorporated city, or town, or any addition thereto.
>
> "b. Nothing in this Act shall be construed as prohibiting the owning, holding, or taking of:
>
> "(1) *Such real estate as is necessary and proper for carrying on the business for which any corporation has been lawfully formed or domesticated in this State;*" (Emphasis supplied.)

Thus, this section just iterates in substance the constitutional mandate, and as before leaves with the courts the question of determining in each individual case just what real property is necessary and proper for the legitimate function of the corporation.

It is the opinion of this court that even though a testatrix devises real estate to a religious corporation which in fact is not necessary and proper for the carrying on of its business that such a devise is not void but voidable; only the State can question the right of the corporation to hold,[21]

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[21] In this connection it is noteworthy that the constitutional prohibition of art. XXII, § 2, is not self-executing and even the States right to bring an action must be based upon specific statutory authority enacted for such purpose. *Texas Co.* case, footnote 11 *supra; Sheridan Oil Co.* v. *Superior Court of Creek County*, 1938, 183 Okl. 372, 82 P. 2d 832; *Parwal Inv. Co.* v. *State*, 1918, 71 Okl. 121, 175 P. 514;

The Oklahoma Escheat statutes are 84 Okl. Stat. Ann. §§ 271-277. Section 272 is now repealed. Cf. 18 Okl. Stat. Ann. § 1.21 to 1.25.

and even then the State must bear the burden of proof in showing such real estate is not "reasonably necessary for the business and objects of the said corporation".[22]

Inasmuch as the plaintiff is not the proper party to question the defendant corporation's right to benefit from the devise in question, this action will be dismissed. It necessarily follows that the application to intervene is hereby overruled, as there is no pending action subject to intervention.[23]

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[22] Footnote 9 *supra*. Cf. 19 C. J. S., Corporations, § 1088.

For definitions of "'necessary and proper'" as applied to corporations generally see the *Texas Co.* case, footnote 11 *supra; Bailey* v. *Banister*, 10 Cir., 200 F. 2d 683; and *Marland* v. *Gillespie*, 168 Okl. 376, 33 P. 2d 207.

[23] In *Levenson* v. *Little*, D. C. N. Y., 75 F. Supp. 575, 576 the court said: "Intervention, however, presupposes the actual pendency of a lawsuit in a court of competent jurisdiction in which the intervener is to be treated as an original party, bound by the proceedings as he finds them. [Citing cases.] There can be no intervention if there is no pending lawsuit. Intervention cannot give life to a lawsuit which does not actually exist. Nor can it create jurisdiction where no jurisdiction exists. • • •"

Also, in *Hofheimer* v. *McIntee*, 7 Cir., 179 F. 2d 789, 791 the court said: "One alternative of appellant's motion was that he be admitted as intervenor. We assume, for the purpose of this decision, that he has a lien upon the fruits of the suit to the extent of one-third thereof, secured by a lien upon certain stock by virtue of the assignment. We assume further that as such lienee, he had a right to intervene for the enforcement of that lien in any proper proceedings. But intervention is ancillary and subordinate to the main cause and whenever a suit ceases to exist by virtue of dismissal by the court, there remains no longer any action in which there can be intervention. 'An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit.' [Citing cases.]"

Opinion of the United States Court of Appeals for the Tenth Circuit, Dated November 9, 1953.

(Reported 210 F. 2d 99).

Before PHILLIPS, Chief Judge, and BRATTON and MURRAH, Circuit Judges.

BRATTON, Circuit Judge.

With provisos not having any present material bearing, section 2, article 22, of the Constitution of Oklahoma provides among other things that no corporation doing business in the state shall buy, acquire, trade, or deal in real estate for any purpose except such as may be located in cities and towns and in additions thereto, and except such as shall be necessary and proper for carrying on the business for which the corporation was chartered or licensed. The Business Corporation Act of Oklahoma was enacted in 1947. Section 20 of the Act, 18 O. S. 1951 §1.20, provides that no corporation of any sort, whether coming within the general scope of the Act or not, shall, except as therein provided, take, hold, or own any real estate located in the state outside of any incorporated city, town, or addition thereto. The section further provides that nothing contained in the Act shall be construed as prohibiting the taking, holding, or owning of such real estate as is necessary and proper for carrying on the business for which any corporation was lawfully formed or domesticated in the state. And the section contains other provisions but they are not material here. Section 21, 18 O. S. 1951 §1.21, provides that any person who shall take or hold any real estate for the use or benefit of any corporation with the intent of evading the provisions of section 20 shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as therein specified; and that any corporation which shall fail or refuse to file a statement as required by section 22 shall be deemed guilty of a misdemeanor, and

upon conviction thereof shall be punished as therein specified. Section 22, 18 O. S. 1951 §1.22, provides among other things that on or before the first day of April of each year every corporation holding or owning any real estate in contravention of the provisions of the Act shall file in the office of the county clerk of each county in which such real estate is located, a statement in duplicate containing the legal description of each tract, piece, or parcel of the land so owned and acquired; and that the statement shall be verified by the oath of an officer or duly appointed agent of the corporation. Section 23, 18 O. S. 1951 §1.23 provides that any corporation owning or holding any real estate in violation of the provisions of sections 20 and 21 shall, in addition to other penalties provided by the Act, be required to pay, for each year, or fraction thereof, during which such title or interest is unlawfully held or owned certain civil penalties computed on the basis of a specified per centum of the assessed value of such real estate; that the state shall have a lien against any such piece, parcel, or tract of land unlawfully held or owned to secure the payment of the penalties, interest, and fees; and that upon collection, the penalties shall be paid into the Permanent School Fund of the state. And sections 24 and 25, 18 O. S. 1951, §§1.24, 1.25 relate to the foreclosure of such liens.

By residuary provision contained in her will, Birdine Fletcher devised and bequeathed all of the rest, residue, and remainder of her property wherever situated to Mount Alverno Convent, of Maryville, Missouri, St. Francis Hospital of Maryville, Missouri, and St. Anthony Hospital, of Oklahoma City, Oklahoma. Sisters of St. Francis, a corporation organized under the laws of Missouri, owns and controls the three residuary devisees named in the will. The testatrix died in 1952, owning at the time of her death among other property a tract of land in Oklahoma containing 160 acres. The will was submitted to the county

court of Oklahoma County, Oklahoma, for probate. A. J. Simler lodged objections to the probate of the will. The county court admitted the will to probate and Simler appealed to the district court. While the proceeding was pending on appeal, Simler, as surviving brother and sole heir of the decedent, instituted in the United States Court for Western Oklahoma this action against the executor of the estate of the decedent and Sisters of St. Francis seeking a declaratory judgment determining that the residuary devise in the will was void insofar as it related to the tract of land in Oklahoma for want of capacity of the defendant corporation to accept, receive, and own, such devise, and further determining that in respect to such real estate the decedent died intestate. The defendants filed a motion to dismiss the action. The State of Oklahoma, on the relation of the County Attorney of the county in which the land is situated, filed a motion for leave to intervene. A complaint in intervention accompanied the motion. In the complaint it was alleged that the devise of the real estate to the named devisees in the general residuary provision in the will was void and that such property should be escheated to the state. Holding that the question of the invalidity of the devise by reason of the incapacity of the defendant corporation to take or hold the real estate could be raised only by the state in a direct proceeding, and that plaintiff in his capacity as sole heir of the decedent was not the proper party to challenge the right of the defendant corporation to benefit from the devise in question, the court entered judgment dismissing the action and denying the application to intervene as there was no pending action subject to intervention. 110 F. Supp. 761. Plaintiff appealed.

A preliminary question concerning the jurisdiction of the trial court should be considered at the threshold of the case. Appellees contend that the subject matter of the action was not within the jurisdiction of the court. The

Opinion of the United States Court of Appeals for the Tenth Circuit, Dated November 9, 1953.

substance of the argument in support of the contention is that under the law of Oklahoma, the county courts are vested with exclusive jurisdiction and control of probate proceedings, subject only to the right of appeal to the district courts; that while probate proceedings are pending, the district courts do not have original jurisdiction to entertain a proceeding of this kind involving the validity of a provision in a will; and that therefore the court below was without jurisdiction of the subject matter of the action. It is the well recognized rule that where the district courts of a state, under their general grant of equity jurisdiction, do not have original jurisdiction to entertain in the first instance a proceeding equitable in character to construe a will, or to determine that a provision contained in a will is invalid as an effective disposition of property, a United States court in that state is without jurisdiction to entertain such an action; but that where the district courts of a state, in the exercise of their general grant of equity jurisdiction, are clothed with jurisdiction of the subject matter of an action of that kind, a United States court in that state has jurisdiction to entertain such an action if there is diversity of citizenship and more than three thousand dollars is in controversy, exclusive of interest and costs. *Sutton* v. *English*, 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 664; *Porter* v. *Bennison*, 10 Cir., 180 F. 2d 523, certiorari denied 340 U. S. 817, 71 S. Ct. 47, 95 L. Ed. 600; *Rice* v. *Sayers*, 10 Cir., 198 F. 2d 724, certiorari denied 344 U. S. 877, 73 S. Ct. 172. Guided by that general rule, we recently reviewed the law of Oklahoma and reached the conclusion that the district courts in that state were vested with jurisdiction to entertain an original proceeding to determine the validity of a provision contained in a will, and that therefore a United States court in that state was clothed with like jurisdiction in an action of that kind, diversity of citizenship with the requisite sum in controversy being present. *Ferguson* v.

Opinion of the United States Court of Appeals for the Tenth Circuit, Dated November 9, 1953.

Patterson, 10 Cir., 191 F. 2d 584. There is diversity of citizenship in this case, and more than three thousand dollars is in controversy, exclusive of interest and costs. Therefore, we adhere to the view that the trial court had jurisdiction of the subject matter of the action. *Ferguson* v. *Patterson, supra.*

There is irreconcilable conflict among the decided cases in respect to whether only the state can be heard to complain that a corporation has acquired and holds property which exceeds in quantity or value the maximum permitted by the charter of the corporation or the law of the state. There are cases to the point that where a corporation is given power to acquire property not in excess of a specified quantity or a specified value, the taking and holding of property which exceeds the limit named is open to challenge only in a direct proceeding by the state. The underlying philosophy of these cases in that the question whether a corporation has acquired and holds property in excess of the limit authorized by the charter of the corporation or by the law of the state is solely between the corporation and the state and does not concern anyone else. *Jones* v. *Habersham,* 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401; *Hamsher* v. *Hamsher,* 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; *Chase* v. *Dickey,* 212 Mass. 555, 99 N. E. 410; *Farrington* v. *Putnam,* 90 Me. 405, 37 A. 652, 38 L. R. A. 339; *McBride* v. *Murphy,* 14 Del. Ch. 242, 124 A. 798, affirmed 14 Del. Ch. 457, 130 A. 283; In re *Darlington's Estate,* 289 Pa. 297, 137 A. 268; *Mansfield* v. *Neff,* 43 Utah 258, 134 P. 1160; *Waters* v. *Waters,* 155 Md. 146, 142 A. 297; *Bank of Commerce & Trust Co.* v. *Banks,* 161 Tenn. 11, 28 S. W. 2d 340, 29 S. W. 2d 658, 69 A. L. R. 1353; *Wade* v. *American Colonization Society,* 7 Smedes & Marshall, Miss., 663, 45 Am. Dec. 324. Other courts have held with equal firmness that the heirs or next of kin of a testator or their successors in interest, may maintain an action in equity to attack the

validity of a devise to a corporation of property which exceeds in quantity or value the maximum permitted under the law of the state. In re *McGraw's Estate,* 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, affirmed *Cornell University* v. *Fiske,* 136 U. S. 152, 10 S. Ct. 775, 34 L. Ed. 427; *Davidson College* v. *Chamber's Ex'rs,* 56 N. C. 253; *Wood* v. *Hammond,* 16 R. I. 98, 17 A. 324, 18 A. 198; *House of Mercy of New York* v. *Davidson,* 90 Tex. 529, 39 S. W. 924; *Proctor* v. *Board of Trustees of Methodist Episcopal Church, South,* 225 Mo. 51, 123 S. W. 862; *Compton* v. *Moore,* 156 Ky. 544, 161 S. W. 540; *Kennett* v. *Kidd,* 87 Kan. 652, 125 P. 36, 44 L. R. A., N. S., 544; *DeCamp* v. *Dobbins,* 31 N. J. Eq. 671. Expressed in varying language, the rationale of these cases is that a will does not take effect until the death of the testator; that if a devisee is forbidden to accept property devised in the will, no title vests in the devisee; that the title vests instantly in the heirs or next of kin of the decedent; and that such heirs or next of kin may proceed in equity to attack the devise and perfect their title to the property.

While these cases are to be considered as a general guide, of course the sharply controverted question whether the validity of the devise involved in this action can be challenged only in a direct proceeding by the state depends upon the law of Oklahoma. No case has been called to our attention in which the question was considered under the law of that state since the Business Corporation Act, *supra,* became effective. In cases decided before that Act became effective, it was held in general that the unlawful acquisition of land in contravention of the constitutional provision and of statutes enacted to carry such provision into effect is voidable only and therefore can be questioned only in a direct proceeding by the state. *Union Trust Co.* v. *Hendrickson,* 69 Okl. 277, 172 P. 440; *Brown* v. *Capps,* 164 Okl. 91, 22 P. 2d 1008; *Texas Co.* v. *State ex rel. Coryell,* 198 Okl. 565, 180 P. 2d 631. But none of those cases involved

directly or remotely the right of a sole heir to challenge a devise to a corporation of real estate which the constitutional and statutory provisions forbid it to take, acquire hold, and own. And those cases do not stand alone. In *Local Investment Co.* v. *Humes,* 51 Okl. 251, 151 P. 878, after saying that a conveyance to a corporation in violation of the constitutional provision was not absolutely void but merely voidable, it was said that the state alone can question the corporation's right to hold under such conveyance, except perhaps where individual wrong or injustice would result from denying the right to do so to such individual. It is significant that there the court recognized an exception to the general rule applicable in instances where individual wrong or injustice would result from the denial to such individual of the right to maintain an action of that kind.

It is manifest that conforming to the consistent course of decisions, section 2, article 22, of the Constitution, and section 20 of the Business Corporation Act, *supra,* must be construed together. And construed in that manner, a corporation is with one exception forbidden to take, acquire, hold, or own real estate outside of cities and towns and additions thereto. The single exception is that a corporation may take, acquire, hold, or own real estate outside of cities and towns and additions thereto, if it is reasonably necessary and proper for carrying on the business for which the corporation was chartered or licensed. The constitutional and statutory provisions are not merely regulative. Save only the single exception to which reference has been made, they are expressly prohibitory. They do not permit a corporation to take and own real estate in contravention of their terms, subject only to the right of the state to forfeit the title. They have none of the characteristics of a conventional provision for the escheat of property. While they do not contain any provision disabling in express language a corporation to take or acquire real estate in dis-

regard of their terms, they are utterly prohibitory. It may well be that a conveyance executed *inter vivos* purporting to pass title to a corporation in contravention of the constitutional and statutory provisions cannot be challenged by the grantor or those holding under him. But it is unnecessary to explore that question for this is not a case of that kind. This will did not take effect until the death of the testatrix. At that time, the corporate residuary legatee under her will was expressly and utterly forbidden by the constitution and the statute to take, acquire, hold, or own the land in controversy. And the land not being legally and effectively devised, no title vested in the devisees. Instead, title immediately passed under the law of descent and vested in the appellant as the sole heir at law of the decedent. In re *McGraw's Estate, supra; House of Mercy* v. *Davidson, supra; Proctor* v. *Board of Trustees of Methodist Episcopal Church, South, supra; Compton* v. *Moore, supra; Kennett* v. *Kidd, supra.*

It is well settled in Oklahoma that section 2, article 22, of the Constitution, *supra,* does not contain any self-executing provisions declaring forfeitures or escheats, and that the jurisdiction of a court to declare an escheat of land taken, acquired, held, and owned by a corporation in violation of the constitutional provision must find its source in an authorizing statute. *State* v. *Prairie Oil & Gas Co.,* 64 Okl. 267, 167 P. 756; *Parwal Investment Co.* v. *State,* 71 Okl. 121, 175 P. 514; *Sheridan Oil Co.* v. *Superior Court of Creek County,* 183 Okl. 372, 82 P. 2d 832; *Texas Co.* v. *State, supra.* The Business Corporation Act will be searched in vain for any provision declaring forfeitures or escheats of land taken, acquired, held, and owned by a corporation in violation of section 20 of such Act. And the general escheats statutes of Oklahoma, 84 O. S. §§ 213, 271, are limited to instances in which there are no heirs or devisees. It is our understanding that under the law of that state now

in effect, property taken, acquired, held, and owned by a corporation in contravention of section 2, article 22, of the Constitution, and section 20 of the Business Corporation Act cannot be escheated to the state. Therefore, if the state were to institute an action challenging the validity of the residuary devise now before us insofar as it concerns the tract of land in Oklahoma on the ground that the residuary devisee was forbidden by law to take, hold, or own such land, the court could not do more than determine and adjudicate that the devise was invalid. The court could not declare an escheat of the property and vest in the state title to the land or the proceeds therefrom. And upon an adjudication in an action of that kind that the devise was invalid, title to the property would vest or remain vested in the appellant as the sole heir of the decedent, free of any claim of the residuary devisee in the will. To deny appellant the right to maintain this action for the protection of his right and title to the land would constitute individual wrong and injustice within the intent and meaning of the exception to the general rule that the state alone may challenge in a judicial proceeding the taking, acquiring, and owning of land by a corporation in contravention of the law of the state enunciated in *Local Investment Co.* v. *Humes, supra.*

In an effort to uphold the judgment denying to appellant the right to maintain the action, appellees urge the contention that 18 O. S. 1951 §§ 541-589 govern and control religious, educational, and benevolent corporations; that under such statutes corporations of that kind are specifically given the right to receive by way of gift, devise, or will, real or personal property, and to hold or dispose of the same in carrying out the purposes of the corporation; that appellee Sisters of St. Francis is a religious and benevolent corporation; and that therefore section 20 of the Business

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Corporation Act does not forbid it to take and own the tract of land in question. But in language too plain for doubt, section 20 of the Business Corporation Act provides that no corporation of any sort, whether coming within the general scope of the Act, or not, shall, except as therein provided, take, hold, or own any real estate located outside of any incorporated city or town, or any addition thereto. For reasons of public policy satisfactory unto itself, the legislature expressly brought within the interdiction of the statute every corporation organized under the laws of the state or licensed to do business within the state, whether falling inside or outside of the general scope of the Act. And it is not the function of this court to restrict or narrow the plain sweep of the section.

The judgment is reversed and the cause remanded for further proceedings not in conflict with the views herein expressed.

Opinion of the United States District Court, Western District of Oklahoma, Dated June 14, 1954, and Judgment Entered Thereon.

(Unreported).

Opinion.

I.

DOES THE JUDGMENT OF THE COURT OF APPEALS MERELY DETERMINE THE CAPACITY OF THE PLAINTIFF TO MAINTAIN THIS ACTION, OR DOES SAID JUDGMENT, IN ADDITION, DETERMINE THE CASE ON ITS MERITS?

Although this Court at the time it handed down its written opinion dismissing the instant action *only* considered the issue of the *capacity* of the plaintiff to maintain the action and did neither consider nor rule upon any other issues dealing with the case on its merits, the Court of Appeals in adjudging that the plaintiff did have the *capacity* to institute this action, thus reversing this Court, went on to rule further that as a matter of law the plaintiff was entitled to judgment for the reason that under the Oklahoma Law, as interpreted by the Court of Appeals, the attempted devise of realty was void *ab initio* or void *per se;* and, consequently, ruled that the title to the realty in question immediately vested in the plaintiff at the time of the death of Birdine Fletcher. The effect of the opinion of the Court of Appeals was that no additional evidence need be submitted for the reason that the pleadings as framed showed as a matter of law that the plaintiff was entitled to judgment.

This Court, of course, is bound by this ruling of the Court of Appeals and must spread the mandate in accordance therewith. There is no way that at this time this Court can logically interpret the Court of Appeals' opinion to *merely* decide the issue of the right of the plaintiff to maintain this suit, when the written opinion of the Court of Appeals clearly indicates that the plaintiff is entitled to a judgment on the merits, *as a matter of law.*

Opinion of the United States District Court, Western District of Oklahoma, Dated June 14, 1954, and Judgment Entered Thereon.

II.

SHOULD THIS COURT ISSUE A PERMANENT INJUNCTION FOR THE PURPOSE OF PREVENTING THE RE-LITIGATING OF ISSUES DETERMINED BY THE JUDGMENT OF THIS COURT?

There is no question but what this Court in the exercise of its equitable powers has the authority to issue a permanent injunction to prevent parties from re-litigating issues which have been settled by the judgment of this Court. For example, see *Jackson* v. *Carter Oil Co.* (C. A. 10, 1950) 179 F. 2d 524; and, *Berman* v. *Denver Tramway Corporation* (C. A. 10, 1952) 197 F. 2d 946, cited by plaintiff in his "Amended Motion for Injunction".

However, this power is a discretionary one, and the Court does not choose to use such authority in connection with the County Court's distribution of the assets of the said estate.

Under the cases which authorize the issuance of a permanent injunction, the injunction is directly leveled at individuals who persist in re-filing and re-litigating matters in state courts which have previously been decided in a federal court.

In the instant case, this Court is of the opinion that the Court of Appeals' ruling, and the judgment entered by this Court in conformity with such ruling, constitutes a valid prior adjudication of the rights of the parties in regard to the realty in issue. However, this Court has no disposition to in effect enjoin the County Court in connection with a distribution under the will now under probate and ready for distribution. This Court is satisfied that the County Court will properly apply the law in distributing the estate in question and take into account the judgment obtained by the plaintiff in the federal court. If, perchance, the County Court should ignore this Court's prior judgment in regard to the rights of the parties insofar as the realty in question

is concerned, the plaintiff has a clear adequate remedy at law in the form of an appeal, wherein the issue of *res judicata* can be urged.

Judgment.

Based upon the opinion, judgment and mandate of the Court of Appeals, Tenth Circuit, and the findings and conclusions of this court filed June 14, 1954:

It is ordered and adjudged that the attempted devise by Birdine Fletcher, deceased, in her last will and testament admitted to probate in the County Court of Oklahoma County, Oklahoma, of the following described real estate, to-wit:

> The Northwest Quarter of Section 34, Township 6 North, Range 10 West of the I. M. in Caddo County, Oklahoma.

to defendant, Sisters of St. Francis, a corporation, is void and no title to said real estate vested in said defendant, Sisters of St. Francis, a corporation, but title to the above described land vested in plaintiff as the sole and only heir of Birdine Fletcher, deceased, immediately upon her death on July 13, 1952, under the law of descent in Oklahoma.

It is further ordered that plaintiff's application for a permanent injunction against defendant, Sisters of St. Francis, a corporation, is denied.

Entered this 14th day of June, 1954.

W. R. Wallace
United States District Judge

Order of the United States Court of Appeals for the Tenth Circuit, Dismissing Appeal.

(Entered October 12, 1954).

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and appellee's motions to dismiss the appeal, and was argued by counsel.

On consideration whereof, it is now here ordered that the appeal in this cause be and the same is hereby dismissed out of this court.

It is further ordered that the clerk of this court forthwith transmit to the clerk of the United States District Court for the Western District of Oklahoma a certified copy of this order.

A true copy as of record.

Entered October 12, 1954.

Opinion of the Supreme Court of Oklahoma in *In re Fletcher's Estate, Simler* v. *Wilson,* Dated March 30, 1954.

(Reported 269 P. 2d 349).

O'Neal, Justice.

This is an appeal from the District Court of Oklahoma County, Oklahoma, affirming the action of the County Court of Oklahoma County, Oklahoma, in admitting to probate the last will and testament of Birdine Fletcher, deceased.

Birdine Fletcher died, testate, on July 13, 1952, at the age of 78 years. She had executed her last will and testament on July 9, 1952. The scrivener, through a typographical error, inserted the date as of June 9, 1952 in the attestation clause for the signature of the witnesses. The will dis-

closes it bears the genuine signature of Birdine Fletcher, and bears the signatures of three subscribing witnesses.

Over the objections of A. J. Simler, brother of the deceased, the will was admitted to probate by an order of the County Court of Oklahoma County, Oklahoma, entered as of October 2, 1952. An appeal was taken by the contestant, A. J. Simler, to the District Court of Oklahoma County, where, upon a trial *de novo,* that court, under date of January 27, 1953, entered its order and judgment that the instrument offered for probate as the last will and testament of Birdine Fletcher, deceased, be admitted to probate, and that the order and judgment of the County Court entered on the 2nd day of October 1952, admitting the will to probate be affirmed, and that the contest to the probate of the will be denied.

The contestant, A. J. Simler, has brought the case here for review. Two questions are presented by the record; namely:

First. Was Mrs. Fletcher competent in a legal sense to execute the will?

Second. Did the principal beneficiaries under the will secure its execution by exercising undue influence upon the testatrix?

We are aided in our determination of these questions by the rules of law frequently announced in our former decisions. *Runnels* v. *Burton,* 202 Okl. 406, 214 P. 2d 709; *In re Heitholt's Estate; State* v. *Duerksen,* 202 Okl. 351, 213 P. 2d 865; and *In re Williams' Estate* (*Williams* v. *Gibson*), 207 Okl. 209, 249 P. 2d 94.

In the foregoing cases the rule is announced as follows:

> "The judgment of the trial court admitting a will to probate will not be disturbed by this court on appeal unless such judgment is clearly against the weight of the evidence."

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In *King* v. *Gibson,* 207 Okl. 251, 249 P. 2d 84, 87, we held:

> "A person has testamentary capacity when his mind and memory are such that he knows, in a general way, the character and extent of his property, understands his relationship to the objects of his bounty and to those who ought to be in his mind on the occasion of making a will, and comprehends the nature and effect of the testamentary act."

In *Brummett* v. *King,* 207 Okl. 607, 251 P. 2d 1062, 1063, we held:

> "Testamentary capacity, or the lack thereof, is a question of fact. There is no rule by which it may be determined, with precision, where capacity ends and incapacity begins, but this question should be determined from all the facts and circumstances of each particular case."

In re Martin's Estate (*Hammond* v. *Frensley*), Okl. Sup., 261 P. 2d 603, 604, we held:

> "The undue influence necessary to invalidate a will is that which, in effect, substitutes the will of others or another for the will of the testator."

In re Cook's Estate (*Cook* v. *Cook*), 71 Okl. 94, 175 P. 507, 509, the rule is announced as follows:

> "Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution."

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The record of the case before us is voluminous containing the testimony of approximately sixty witnesses testifying in the trial court extending over a period of nine days, as well as the record of approximately eight hundred exhibits. The case was well tried by counsel for the respective parties.

Contestant Simler makes the contention that the will of Mrs. Fletcher, his sister, was prepared by Sister Mary Francis Eugene at St. Anthony's Hospital in Oklahoma City; that said hospital is a beneficiary under the will and, therefore, under the rule announced in *Anderson* v. *Davis,* 208 Okl. 477, 256 P. 2d 1099, the proponent failed to meet the burden of proof required to sustain the factum of the will.

The *Anderson* case, *supra,* holds that when a will is drawn by a beneficiary who is in confidential relation with testatrix, a presumption of undue influence arises. The premise assumed by the contestant is not supported by this record. Sister Mary Francis Eugene did not prepare the will in question, neither is she a beneficiary under the terms of the will.

On July 9, 1952, Mrs. Fletcher went to St. Anthony's Hospital and requested this Sister to recopy her will dated June 12, 1951, which will had previously been prepared at her request by J. B. Dudley, an attorney of Oklahoma City.

In paragraph 1 of the former will referred to, Mrs. Fletcher requested that paragraph 1 be amended by adding the following words: "and the sums hereinafter mentioned and set out for Mass offerings."

Paragraph 2 of her present will should read as follows:

> "I will and direct the payment of $1600.00 as Mass Offerings to be distributed to the following: To His Excellency, Bishop Eugene J. McGuinness, Bishop of Oklahoma City and Tulsa, and/or his

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successor in office, the sum of $1,000.00, to be distributed by him as he deems best: To the Carmelite Fathers, 1125 South Walker, the sum of $100.00 for three (3) set of Gregorian Masses and ten other Masses; to Father James H. Ross, Oklahoma City, Oklahoma, $200.00; Carmelite Fathers, Marylake Novitiate, Hinsley, Arkansas, $100.00 and ask that three set of Gregorian Masses and 10 others, be said immediately; to Msgr. Gilbert Hardesty, $100.00. It is my wish and I so direct immediate payment of the above."

Paragraph 3 of the will of June 12, 1951, as prepared by Mr. Dudley, read as follows:

> "I will and bequeath to my brother, A. J. Simler of Little Rock, Arkansas, the sum of One ($1.00) Dollar."

Mrs. Fletcher requested the Sister who was doing the typing of the will to add the following words: "this amount and no more."

With reference to paragraph 21 of her former will she requested the Sister to add the following words: "and Fred E. Suits, Attorney, of Oklahoma City, Oklahoma, (my present personal attorney) as attorney to probate my will and represent my Executor W. H. Wilson, in the administration of my estate."

Paragraph 22 of the present will was not contained in the former will. Paragraph 22 reads:

> "Whoever contests this will shall forfeit all bequeaths and benefits mentioned herein, of every kind and character."

Except for the quoted changes above enumerated and the omission of a provision contained in the former will

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for a $500 legacy to a friend, the will of July 9, 1952 and the will of June 12, 1951, prepared by Judge Dudley for Mrs. Fletcher, are identical, save and except the names of the attesting witnesses to the two instruments. Furthermore, the Sister who typed the will at Mrs. Fletcher's request, did not know the nature of the typing requested by Mrs. Fletcher until the so-called "Dudley Will" was given to her for recopying. After the will was retyped, Mrs. Fletcher requested that certain employees of St. Anthony's Hospital be called to witness her will. Only one of the witnesses requested by her was available, so Sister Eugene called others to witness Mrs. Fletcher's signature. After their appearance Mrs. Fletcher signed the will and requested the three persons appearing to sign their names as attesting witnesses.

We are unable to find any testimony supporting contestant's assertion that Sister Mary Francis Eugene made any suggestion in the changes made by Mrs. Fletcher in the present will.

Contestant asserts that the testatrix was incompetent by reason of her age and physical and mental condition to execute a valid will.

The applicable rule is that in a will contest, where due execution and attestation are established, a presumption of testamentary capacity arises, and the burden of proving unsoundness of mind of the testatrix is upon the contestant. See *In re Martin's Estate, supra.*

In re *Baker's Will,* 207 Okl. 158, 248 P. 2d 627, 632, we held:

> "A testator has a sound mind for testamentary purposes when he can understand and carry in mind, in a general way the nature and situation of his property and his relation to those who naturally have some claim to his remembrance, and to those

in whom, and the things in which, he has been chiefly interested. Mere showing that at time of execution his memory was bad, and that he was physically weak, unaided by other evidence is insufficient to establish lack of testamentary capacity."

In re *Lamar's Estate (Bray* v. *Leeper)*, 206 Okl. 244, 242 P. 2d 727, 728, we said:

> "The testamentary capacity of a testator must be determined as of the time of the making and execution of the will. In determining that question, prior and subsequent acts have bearing only to the extent of assisting in determining the mental status of the testator at the time of the execution of the will."

As the pivotal question raised by contestant is the mental competency of the testatrix to execute the will, we narrate evidence of probative value of the proponents and the contestant on that issue.

John Fletcher and Birdine Fletcher, husband and wife, formerly lived on a farm near Anadarko, Oklahoma; they leased their land for oil and gas for a bonus of $16,000; oil development followed resulting in the acquisition of an estate valued at approximately one-half million dollars. For more than twenty years the Fletchers have resided in Oklahoma City. John Fletcher died at the age of 91 years in February, 1951. His wife died in July, 1952.

The evidence discloses that during the last five years of her life Mrs. Fletcher suffered from physical impairment necessitating the services of several physicians, as well as hospitalization. On one occasion she had shingles and her physician prescribed barbiturates for relief of pain. On another occasion she suffered with paroxysmal tachycardia, commonly known as "rapid heart beat" necessitating hospi-

talization, at which time her physician gave her several prescriptions for nembutal and nucidin to be administered to her by her nurse. On another occasion Mrs. Fletcher had a fall in her home resulting in a head injury and unconsciousness, and she was ordered by her physician to the hospital for treatment. On this occasion her physician prescribed codine to relieve her restless condition.

The record discloses that several physicians treated Mrs. Fletcher at her home, as well as St. Anthony's Hospital, covering a period of several years prior to her death. Although the contestant asserts that his sister was a narcotic addict, the proof does not support the assertion. Her physicians' testimony supports a conclusion that the barbiturates prescribed by them and taken by Mrs. Fletcher were not habit forming and that drugs in the narcotic classification were only prescribed for her treatment when deemed necesary by them for relief of a specific ailment. Although the record is replete by contestant's reference to "red birds," "yellow jackets," "white pills," "brown pills" and dark and green liquid medicines, there is no evidence in the record that any medicine taken by Mrs. Fletcher had not been prescribed by a duly licensed and practicing physician, either in the general practice or connected as a staff member of St. Anthony's Hospital.

During these years the Fletchers occupied a residence on West 47th Street in Oklahoma City. According to the evidence of practical nurses and maids employed in the home, as well as the neighbors, she maintained a neat and clean house, frequently helping with the preparation of meals and performed her household duties. She was active in maintaining a flower garden, spending many hours in its cultivation and care. As to her personal care the evidence discloses that she kept herself scrupulously clean and neat.

The contestant, Simler, and his wife, who had resided in Little Rock, Arkansas for years, came to visit the

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Fletchers in February, 1950, and moved into the Fletcher home in March, 1950, and remained there until October of that year. It was during this period of time that Simler contends that his sister used barbiturates and other drugs to excess resulting in her physical and mental incapacity to execute the will in question.

During their occupancy of the Fletcher home, the Simlers were paid various sums by Mrs. Fletcher for their services. In addition to these payments she gave Simler and one of his sons $500 each, both of these payments being made by check. Two families living in a medium sized five room house resulted in inevitable family differences and conflicts, which culminated in a request by Mrs. Fletcher that the Simlers leave her home. A few days later Simler filed a petition in the County Court of Oklahoma County to declare his sister an incompetent person. The following day he withdrew that petition, but a few days thereafter filed a second petition to have her placed under guardianship. The County Court on October 20, 1950, entered an order declaring Mrs. Fletcher an incompetent person and appointed a guardian of her person, as well as her property.

In March, 1951, she filed her petition for restoration of competency, and on the 20th day of April, 1951, an order was made by the Judge of the County Court restoring her to competency.

John Fletcher, her husband, had died in February of that year and upon Mrs. Fletcher's application she was appointed administratrix of John Fletcher's estate; that estate was duly administered and Mrs. Fletcher, as the sole surviving heir, was declared to be the beneficiary thereunder.

It is quite obvious from the record that her services as administratrix of her husband's estate discloses an unusual mentality for a person in her station of life considering her advancing years. During these years, as disclosed by the

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testimony and as evidenced by hundreds of exhibits in the record, she consummated many business transactions requiring the issuing of many hundred checks. In almost every instance these checks were prepared entirely by her.

In June, 1951, Mrs. Fletcher went to the office of J. B. Dudley, an attorney in Oklahoma City, and requested him to draw up her will. She advised him that her husband had recently died and that his estate was in the process of administration and was about to be closed. She advised him that she had been declared an incompetent person on the application of her brother, but that upon a further hearing she had been restored to competency. She advised him generally as to the nature of her property and certain bequests she desired to make. Mr. Dudley suggested that she reduce to writing the names of those to whom she desired to make such bequests. She returned to his office the following day with a list of names which she had prepared in her own handwriting. After Dudley prepared a portion of the will he advised her that some disposition should be made of the residue of her estate. She told him she wanted the residue to go to St. Anthony's Hospital at Oklahoma City, and the two other Catholic institutions named in her will. After the will was drafted she signed the same and it was witnessed in due form.

In her several trips to Dudley's office she spoke of the fact that her brother had put her under guardianship which had resulted in great expense and annoyance to her, and that she expressed resentment against him for having done so, and that therefore she wanted to limit her bequest to him in the sum of $1. Dudley's testimony is to the effect that she visited his office three or four times and that he formed the opinion that she entertained a fixed notion as to the disposition of her property, and that she was a competent person at the time of the execution of that will.

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Subsequent to her restoration of competency and on September 27, 1951, Mrs. Fletcher requested a loan of $15,000 from the First National Bank and Trust Company of Oklahoma City, Oklahoma. An officer of that bank testified that he requested she furnish the bank with a financial statement, which she did. The loan was made for $15,500 open, that is, without security. She paid $10,000 on the loan in December, 1951, and $5,500 in February, 1952, thus retiring the indebtedness prior to its maturity. The proceeds of this loan were used by her in paying off her indebtedness in the sum of $15,000 to the Fidelity National Bank of Oklahoma City.

In March, 1951, Mrs. Fletcher entered into a contract with Todd Ferguson, an authorized real estate agent, to sell certain property owned by her on N. W. 47th Street in Oklahoma City. This property was sold by her agent for the sum of $7,500. In closing that transaction she declined to sign the deed until her attorney had reviewed the transaction, and advised her that the purchaser had performed the terms of the written contract with reference to the sale of the property.

In February, 1952, Mrs. Fletcher bought new furniture for her home; she examined certain household furniture then in a wholesale house. Afterwards she accompanied the retail salesman to her home where they negotiated for a price for her old furniture which was to be taken in as part payment on the new. In that transaction she issued two checks, Exhibits O-698 and O-699, which checks disclosed a clear legible handwriting and signature.

A geologist and oil operator had known Mrs. Fletcher since 1948. After her restoration to competency she phoned him requesting that when convenient to him to please call at her home as she was contemplating selling all or part of her oil royalty holdings in Caddo County, Oklahoma. He called upon her during the summer months fifteen to twenty

times during the year 1951, and several times in the fall of that year. Mrs. Fletcher suggested a selling price of $150,000 for her royalty interest. The geologist made a counter proposition of $100,000. They were unable to agree upon terms and therefore the sale was not consummated. During one of these meetings she expressed the wish to sell her oil properties because so many people were pressing her for assistance in various forms. The geologist testified: "* * * there is no question in my mind that one who has handled through the details that I saw she was handling her estate, and what she was doing with it, there is no question in mind but what she was competent."

In August, 1951, Mrs. Fletcher loaned $30,507.24 to Katherine F. and B. F. Watkins, with which to purchase a grocery store. The Watkins in that transaction were represented by an attorney, both in negotiating and closing the loan transaction.

Contestant Simler's evidence largely covers a period of time prior to the guardianship proceedings of October, 1950. After those proceedings were filed he went back to Little Rock, but returned to Oklahoma City in February, 1951, to attend the funeral of John Fletcher, and also to attend the hearing of March, 1951, in the County Court upon his sister's application for restoration to competency. He saw his sister at St. Anthony's Hospital in May, 1952.

Two psychiatrists were called by the contestant to express an opinion as to the competency of Mrs. Fletcher to make a testamentary disposition of her property. One psychiatrist testified that he was requested by the County Judge of Oklahoma City to observe Mrs. Fletcher during the hearing on Simler's application to have her declared an incompetent. Upon a stated hypothetical question, based upon Mrs. Fletcher's medical history as a patient at St. Anthony's Hospital covering a period from 1948 to 1952, together with the testimony of various witnesses as to her

conduct in the home, including alleged conversations with her brother and others, he gave it as his opinion that a woman of her age, who had suffered these changes as represented by her various diagnoses between 1948 and 1952, would be an unstable and easily unbalanced person.

Upon cross-examination in answer to a hypothetical question, based upon Mrs. Fletcher's services as the administratrix of her husband's estate, the various business transactions delineated by the witnesses and the circumstances surrounding the making of her will in July, 1952, the witness expressed the opinion that:

> "I think I will state this: that it would be an indication that she certainly did not appear to be grossly incompetent to bankers and others who are judges of character, as well as collateral, that would be presumptive evidence of competency."

Again delineating the circumstances of Mrs. Fletcher's appearance on July 9, 1952, based upon her request to Sister Eugene to have her will retyped, and suggesting the additions as indicated, and certain deletions from a will prepared for her in June, 1951, the witness testified: "Well, it would show certain evidence of conscious awareness of the facts."

The other psychiatrist expressed an opinion based upon a hypothetical question substantially embracing the evidence submitted by the contestant, that the picture thus presents an unstable condition of the patient, and which indicates a type of personality one often finds in an addiction. He then states: "Now, this would not necessarily make her an irresponsible person."

Upon cross-examination, based upon a hypothetical question embracing substantially the testimony as delineated by proponent's witnesses with reference to the various transactions had by them with Mrs. Fletcher, including the

testimony with reference to the execution of the will prepared by Judge Dudley for her, the psychiatrist expressed the opinion that in June, 1951, she was a competent person. He further expressed a like opinion as to her competency as of July 9, 1952, when the present will was executed.

A review of the testimony does not in our opinion support the contestant's position that the Sisters of St. Anthony's Hospital or any of its representatives or employees in any manner exercised any undue influence upon Mr. [sic] Fletcher inducing her to make the bequests contained in her will. It is true that a friendly relationship existed between Mrs. Fletcher and Sisters Agnes and Eugene, and perhaps with other employees at the hospital; that was a natural relationship arising out of their common religious faith, and which was augmented by the fact that Mrs. Fletcher frequently worshiped in the chapel in the hospital. She had been a patient in the St. Anthony's Hospital on a number of occasions and it was a natural expression of gratitude that she made a present of an electric fan to one Sister and a clock to another. Neither can the circumstances that on several occasions after she attended Mass at the hospital chapel that she was invited by the Sisters to have breakfast with them be construed as of probative value to support contestant's allegation of improper influence.

There is evidence tending to support a finding that Mrs. Fletcher had for some years prior to the execution of her will, made annual donations to Catholic charities. Considering her wealth, these contributions were indeed very moderate and negative the inference that they were not voluntarily made.

John and Birdine Fletcher had no children. As sole heir of her husband's estate she elected to bequeath her property to her friends and to the beneficiaries named in her will.

Opinion of the County Court of Oklahoma County, Dated November 30, 1954, and Additional Statement of that Court.

We are of the view that the conclusions reached by the County Court and affirmed on rehearing by the District Court, that Mrs. Fletcher was a competent person at the time her will was executed is supported by the weight of the evidence. The judgment must therefore under the applicable principles of law, heretofore referred to, be and the same is hereby affirmed.

Opinion of the County Court of Oklahoma County, Dated November 30, 1954, and Additional Statement of that Court, Dated December 9, 1954.

(Unreported).

Opinion.

This has been an intricate and perplexing case to decide, partly because it was felt that a decision following the Federal Court would disturb the titles of other benevolent, charitable and religious institutions whose ownership was based on settled rules of property.

That conception was due to the fact that a cursory reading of the federal opinion led one to believe that a devise to such an institution of lands located outside of cities and towns and additions thereto would be utterly void. But such a devise would only be prohibited where the land was not necesary and proper for "carrying on the business for which it was chartered or licensed".

Since under its charter the particular corporation was authorized to take by devise, it seems to me that the case revolves around that constitutional provision, because all the numerous statutory enactments concerning all sorts of corporations depend for their life on Section 2, Article 22, of the Constitution of Oklahoma, although it took legislation to vitalize it. It naturally follows that any decision of

the court or of the Federal Court will have no effect on other titles. Whether those titles are valid will depend on the facts in each particular case. They will stand or fall on their own footing.

As to the future, the problem can readily be solved through bequests of stocks and bonds; through legacies of cash, thus forcing sales of real estate to pay legacies; by bequests of money, with provision for sale of real estate to pay cash bequests; by devising real estate to trustees, with instructions to convert the real estate into cash and distribute the proceeds to such institutions; and perhaps by other methods. Philanthropic institutions need not suffer, for there are ways for benefactors to safeguard their gifts. If nothing more comes out of this case than a program of informing the general public, then all the litigation involved here may yet prove to be worth while.

While this court, under the issues framed, first assumed jurisdiction, we do not deem it necessary to determine whether the Federal Court had jurisdiction or whether we are bound by the judgment of that court, except we will state that we deliberately avoided rendering a decision in advance of their opinion because we felt that was the judicial and timely thing to do, just as they declined to interfere with the administration of the case in the probate court. However, having submitted themselves to the jurisdiction of the Federal Court, are all parties not bound by the judgment of that court? See *In Re: Hunter's Estate*, 122 P. 2d Okla. 1017, which arose in this court back in 1942, or, at least the opinion was rendered in 1942.

It is easier to decide this case when we feel that whatever judgment is finally rendered will not affect the titles of other institutions similarly situated. Also, we feel that no matter how we rule, the case will be appealed by either or both parties and ultimately the State Supreme Court may be called upon to hand down a final decision.

Opinion of the County Court of Oklahoma County, Dated November 30, 1954, and Additional Statement of that Court, Dated December 9, 1954.

Digressing from the constitutional inhibition, we find that the various statutory provisions in general hold that no corporation shall own or hold more real property than is reasonably necessary for the business for which it was formed.

In this case we hold that the Caddo county farm was not necessary and proper for the purposes for which the instant corporation was formed. The only testimony offered was to the effect that the income from the oil producing farm would be used to help maintain existing or added facilities. There is no testimony showing any intention to use the farm for the establishment on the farm of convents, hospitals, schools of nursing or other schools, as authorized by the corporate charter. That is the crux of the case and the point of law involved.

Two important cases from our own Supreme Court have been cited: The *Texas Company* case and the *Pelter* case; but they are not decisive. The Texas Company was engaged in a general oil business and the court held it had a right to own oil and gas leases, mineral rights, and incidental rights to use of the surface, and also the right to hold fee simple titles in cases where lands are "specifically used and useful and proper and necessary in the general operation of defendant's business in this state." And in the *Pelter* case it was definitely shown that the church intended to use the real estate in question for recreational purposes and as a meeting place for certain church societies. The point involved in the present case is not new, and, incidentally, it might be added that the right of the corporation to take in the *Pelter* case was not attacked by the State. The Administratrix, with the will annexed, raised the question in her Final Account and Petition for Distribution by alleging that the devise to the church was void. All of the fabulous litigations in the Federal Court could have been saved by adopting the practice followed in the *Pelter* case.

Opinion of the County Court of Oklahoma County, Dated November 30, 1954, and Additional Statement of that Court, Dated December 9, 1954.

I believe the statutory provisions were enacted to prohibit corporations from owning lands not necessary to their use. The purpose of the law is to permit corporations to use the real estate and not merely to collect the income from the property. If collecting the income were all that is necessary, then there would be no limit to the quantity of real estate a corporation might own, and the very purpose of the law would be thwarted and the constitution and statutes would be lifeless and meaningless.

The use is the thing.

I am mindful of the fact that there are other questions involved which we leave to a higher court. There is the query as to whether this court could sever the mineral rights from the naked land, especially since the land was oil producing at the time of death of the testatrix; or could hold that the oil when brought to the surface was personalty; and therefore, the question of whether the court could distribute the mineral rights and the oil when produced to the corporation and the naked legal title to the heir at law, subject to incidental rights to use of the surface in the corporation.

We come now to the second phase of this case, and I consider it quite easy to determine.

The Federal Court held the devise void and the devisee being unable to take, title vested at death in the heir at law, and that all oil runs produced since death followed into the hands of Simler. If the devise was void and Simler took immediately upon death, he took subject to the further jurisdiction of this court and to other applicable statutes. The effect of the decision was that the farm in Caddo County was not disposed of by the will, since there was no legal taker. And the farm did not fall into the residuary estate because here too there was no devisee capable of taking.

Opinion of the County Court of Oklahoma County, Dated November 30, 1954, and Additional Statement of that Court, Dated December 9, 1954.

Title 84, Sec. 3, OSA provides that "The property of a testator, except as otherwise especially provided in this code and in the chapter on civil procedure, must be resorted to for the payment of debts in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts.

2. Property not disposed of by the will.

3. Property which is devised or bequeathed to a residuary legatee.

4. Property which is not specifically devised or bequeathed, and,

5. All other property ratably. Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for."

Since there was no property expressly appropriated by the will for the payment of debts, and since there is no property devised or bequeathed to a residuary legatee capable of taking, subsections 2 and 4 come into play. Under the theory of the Federal Court, the Caddo County farm was not disposed of by the will and was not specifically devised or bequeathed, and we are therefore relegated to subsections 2 and 4 in order to determine what property is liable for the debts of the estate. Subsections 2 and 4 mean the same thing or bring about the same results, but, since subsection 2 is first in priority it will control and we must look to the property not disposed of by the will.

We cannot follow the declaration that the oil runs belong to Simler, but on the contrary, hold that the farm and all oil runs produced since the death of testatrix became subject to the further control, jurisdiction and disposition of

this court; and we therefore hold that Simler is entitled to the farm and oil runs, subject to payment of all estate taxes, debts and costs of administration.

The executor will be allowed regular and extraordinary fees in the total sum of $10,000.00. Mr. Suits and his associate, Mr. Dudley, as attorneys for the executor, will be allowed a total fée of $25,000.00 to be divided between them as they agree. These allowances are to be credited with any advancements made. If the attorneys feel that they are entitled to larger fees, they must look to the institutions, since much of their service was rendered not to the estate but in a contest between heirs, and the court under the case of *Nichols* v. *Wallace* has no right to award fees for that service. The Supreme Court has clearly held that. The fees above allowed by this court are for services rendered to the estate, exclusive of services rendered heirs personally.

Distribution will be made according to the terms of the will, except that the Caddo County farm and all oil runs therefrom after payment of such taxes, debts and costs of administration will go to Simler. When all of those things are satisfied, Simler will be entitled to net and future oil runs.

Additional Statement.

This additional statement is not intended as a modification of the statement made November 30, 1954, but in explanation and clarification thereof, and particularly of the last paragraph.

At the time of the original statement in answer to an inquiry made by the Attorneys for the Executor, the Court orally stated that distribution would be made according to the terms of the will and according to the statutes. The

Opinion of the County Court of Oklahoma County, Dated November 30, 1954, and Additional Statement of that Court, Dated December 9, 1954.

Court in the statement of November 30, 1954, held that the farm in Caddo County was not disposed of by the will since there was no legal taker and the farm did not fall into the residuary estate because there was no devisee capable of taking and that therefore under Section 3, Title 84, OSA, the Caddo County farm and the oil runs therefrom had to be resorted to for the payment of taxes, debts and cost of administration. As under said Section 3 the property not disposed of by the will must be resorted to for the payment of taxes, debts and costs of administration, it is likewise true under Section 4, Title 84, OSA that the property not disposed of by the will must be resorted to for the payment of legacies, and it was the intention of the Court under the last paragraph of the statement of November 30, 1954, to include legacies as well as taxes, debts and cost of administration and to say that when all taxes, debts, costs of administration and legacies were satisfied that then Simler would be entitled to the farm and to net and future oil runs.

Appendix B.

Statutes and Constitutional Provisions Involved.

Oklahoma Constitution, Art. XXII, Sec. 2:

"*Corporations—Buying, acquiring or dealing in real estate.*—No corporation shall be created or licensed in this State for the purpose of buying, acquiring, trading, or dealing in real estate other than real estate located in incorporated cities and towns and as additions thereto; nor shall any corporation doing business in this State buy, acquire, trade, or deal in real estate for any purpose except such as may be located in such towns and cities and as additions to such towns and cities, and further except such as shall be necessary and proper for carrying on the business for which it was chartered or licensed; * * *."

Oklahoma Statutes 1951, Title 18, Secs. 1.20-.25:

"§*1.20 Limitations upon real estate ownership.*—a. No corporation of any sort, whether coming within the general scope of this Act or not, shall, except as herein provided, own, hold, or take any real estate located in this State outside of any incorporated city, or town, or any addition thereto.

b. Nothing in this Act shall be construed as prohibiting the owning, holding, or taking of:

(1) Such real estate as is necessary and proper for carrying on the business for which any corporation has been lawfully formed or domesticated in this State;

* * * * * *

Laws 1947, p. 92, §20.

§*1.21 Evasion of provisions a misdemeanor.*—a. Any person who shall take or hold any real estate

for the use or benefit of any corporation with the intent of evading the provisions of Section 20 of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail for a term not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment.

b. Any corporation which shall fail or refuse to file a statement as required in Section 22 of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not exceeding One Thousand Dollars ($1,000.00). Laws 1947, p. 93, §21.

§*1.22 Statement of ownership to be filed: index: copy to county attorney.*—a. On or before the first day of April of each year every corporation holding any real estate in contravention of the provisions of this Act shall file in the office of the county clerk of each county in which such real estate shall be located, a statement in duplicate containing the legal description of each tract, piece, or parcel of real estate so owned or acquired, the date of the acquisition of each tract, piece, or parcel, the amount of the last preceding assessed valuation thereof and the purpose and method of the acquisition thereof. The statement shall be verified by the oath of an officer or duly appointed agent of the corporation.

[b. and c.: County clerk required to index and record such statements and to send copies to the county attorney.]

§*1.23 Penalties to permanent school fund: lien: foreclosure.*—a. Any corporation owning or holding any real estate in violation of the provisions of Sec-

tions 20 and 21 of this Act shall, in addition to other penalties provided by this Act, be required to pay, for each year, or fraction thereof, during which such title or interest is thus unlawfully owned or held, the following penalties:

(1) For the first year, one per centum (1%) of the assessed value of such real estate unlawfully owned or held;

(2) For the second year, two per centum (2%) thereof;

(3) For the third year, three per centum (3%) thereof;

(4) For the fourth year, four per centum (4%) thereof;

(5) For the fifth year, five per centum (5%) thereof;

(6) For the sixth year, six per centum (6%) thereof; and

(7) For each year thereafter, six per centum (6%) thereof.

Provided, however, that no corporation shall be subject to more than one penalty, for each calendar year, for each tract, piece, or parcel of real estate thus held in violation of the provisions hereof, but the penalties provided herein shall be cumulative.

* * * * * *

b. The penalties, upon collection, shall be immediately paid over to the Commissioners of the Land Office, who shall credit them to the Permanent School Fund of this State.

c. The state shall have a lien against any piece, parcel, or tract of real estate to secure the payment

of all penalties, interest, and fees accruing from such unlawful owning or holding of any such real estate; provided, that such lien shall not attach thereto, or in any way affect the title thereof, until an action to subject such real estate to such lien and a foreclosure thereof has been instituted in the district or superior court of the county wherein such real estate is located. Filing of such action shall be notice *lis pendens* and anyone thereafter acquiring any such real estate shall take it subject to such lien. Laws 1947, p. 93, §23.

§1.24. *Collection of penalties: procedure*—a. Whenever the county attorney of any county shall have reason to believe that any real estate located in such county is owned or held by a corporation in violation of the provisions of this Act, it shall be his duty to give written notice to such corporation that it is subject to the penalties provided herein, that such penalties must be paid to him within thirty (30) days from the date of such notice, and that there is additionally due and payable a collection fee equal to fifteen per centum (15%) of the total penalties collected as to any tract, piece, or parcel of real estate which is thus unlawfully owned or held. * * * If such penalties be collected by instituting an action and procuring a judgment therefor, such collection fee shall be increased to twenty-five per centum (25%) of the penalty recovered, and in no event less than one hundred dollars ($100.00).

b. In the event such penalty not be paid within thirty (30) days from the date of such notice, the county attorney shall institute an action in the name of the State in the district or superior court of the county in which such real estate is located for the recovery of the penalties, together with interest thereon at the rate of ten per centum (10%) per

annum from the date of such notice, the collection fee provided for above, and all costs of the action, and for a further judgment establishing and foreclosing the lien created by Section 23 hereof, unless the real estate which is alleged to have been unlawfully owned or held, shall have been disposed of prior to the commencement of the action.

c. The petition in such case shall set forth:

[(1) and (2): Description of real estate and names of parties.]

(3) If the establishment and foreclosure of a lien upon such real estate be sought in the action, the names as defendants, of all persons claiming real estate, including all tenants and persons in actual possession thereof; and

(4) The facts and circumstances in consequence of which it is alleged that such real estate is owned or held in violation of the provisions of this Act.

d. The filing of such petition, and all other procedure relating thereto, in all respects shall be governed by and subject to the same laws as in other civil actions. Laws 1947, p. 94, §24.

§*1.25. Judgment: Execution.*—a. If the State shall recover a judgment against such corporation in such action, such judgment shall include and be entered for:

[Statutory penalties plus 10% interest plus 25% collection fee and costs.]

If the establishment and foreclosure of a lien upon the real estate be requested in the petition, a decree establishing such lien upon such real estate and an order of foreclosure also shall be decreed and entered.

• • • • • •

Statutes and Constitutional Provisions Involved.

Laws 1947, p. 95, §25."

Religious, Educational and Benevolent Corporations' Right to Take and Hold Real Estate

Oklahoma Statutes 1951, Title 18, Secs. 543, 581, 588-89:

"§543. *Right to hold real property limited.*—All such corporations [organized for religious, charitable, educational, benevolent or scientific purposes] may hold all the property of the association owned prior to incorporation, as well as that acquired thereafter in any manner and transact all business relative thereto; but no such corporation shall own or hold more real property than may be reasonably necessary for the business and objects of the said association. R. L. 1910, §1461."

"§581. *Benevolent and charitable corporations —Purposes.*—The following associations for benevolent and charitable purposes may become incorporated, as provided in this Article, to-wit:

1. To establish and maintain hospitals and infirmaries for the cure of the sick and support of the aged and indigent, and asylums for orphans.

• • • • • •

R. L. 1910, §1475."

"§588. *Benevolent corporations may own real or personal property.*—That any benevolent corporation, including chartered fraternal, grand and subordinate lodges and societies, are hereby empowered to receive, either by way of gift, purchase, grant, devise or by will, real or personal property, and to hold the same, and dispose of the same in the carrying out of the purposes of the corporation, society or lodge. Laws 1915, ch. 116, §1.

Statutes and Constitutional Provisions Involved.

§589. *Charter as benevolent corporation—Trustees—By-laws.*—Before being competent to so receive such property, such society shall obtain a charter as a benevolent corporation in the manner provided by law from the Secretary of State, and elect trustees, who may be the same trustees already elected under their fraternal rules, and whose by-laws may, so far as they do not contravene the statute laws of the state, be substituted for the by-laws required to be adopted upon obtaining a charter. Laws 1915, ch. 116, §2."

Probate Jurisdiction

Oklahoma Statutes 1951, Title 20, Secs. 271, 275:

"§271. *Jurisdiction of county court—Title or boundaries of land—Counterclaim or set-off.*— • • • The county court, coextensive with the county, shall have original jurisdiction in all probate matters • • •. R. L. 1910, §1816; Laws 1917, ch. 119, p. 184, §1; Laws 1925, ch. 142, p. 206, §1."

"§275. *Probate appeals.*—In all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county courts to the district court of the county, in the manner provided by law and in all cases appealed from county court to the district court, the cause shall be tried *de novo* in the district court upon questions of both law and fact. R. L. 1910, §1820."

Oklahoma Statutes 1951, Title 58, Secs. 1, 631-32:

"§1. *Probate jurisdiction of county court.*—The county court has probate jurisdiction, and the judge thereof power, which must be exercised in the cases, and in the manner prescribed by statute:

1. To open and receive proof of last wills and testaments, and to admit them to proof and to revoke

the probate thereof, and to allow and record foreign wills.

* * * * * *

7. To order and regulate all distribution of property or estates of deceased persons.

* * * * * *

R. L. 1910, §6189."

"§*631. Distribution.*—Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; * * *. R. L. 1910, §6463."

"§*632. Rights fixed by decree.*—In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal. R. L. 1910, §6464."

No. 510

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1954

W. H. Wilson, Executor of the Estate of Birdine Fletcher, Deceased, and Sinclair Oil Corporation, a corporation,
Petitioners,
versus
A. J. Smalls,
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Respondent.

January, 1955.

In the
Supreme Court of the United States
OCTOBER TERM, 1954

No. 510

W. H. WILSON, Executor of the Estate of Birdine Fletcher, Deceased, and SISTERS OF ST. FRANCIS, a corporation,
Petitioners,

VERSUS

A. J. SIMLER,
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR A WRIT OF CERTIORARI

The case of *Markham, Alien Property Custodian* v. *Allen*, 326 U.S. 490, seems to be conclusive on the right of the Federal Court to render the judgment in this case.

In the original case, the executor and Sisters filed a motion to dismiss the complaint in the District Court (pp. 8-20, Print of Record in No. 677 October Term, 1953) in which they admitted every allegation of fact alleged in the complaint (pp. 2-7, Print of Record in No. 677 October Term, 1953) and attached thereto the charter of the cor-

poration showing the purposes and objects for which it was formed, and supported the motion to dismiss by an affidavit of their attorney "*for the purpose of showing that there is in this action no genuine issue as to any material fact.*" See Appendix 1. They also filed an answer which makes the same admissions (R. 54-57).

Thus, the Court of Appeals had before it on the first appeal (*Simler* v. *Wilson, et al.*, 210 F.2d 99) a well defined issue of law as to whether the corporation "whose objects and purposes" *are to found and maintain a religious, benevolent order; and establish, conduct and maintain conventsy hospitals and schools of nursing in connection with such hospitals*" and which operates two hospitals, one in Oklahoma City and one in Maryville, Missouri, and a convent there, is authorized to take under the Constitution and statutory provisions of Oklahoma, an oil producing farm nine miles out in the country from Anadarko, Oklahoma, and over 81 miles to its nearest establishment.

The executor and Sisters filed a petition for rehearing (pp. 38-41, Print of Record in No. 677, October Term, 1953) in the Court of Appeals after the judgment and opinion on the first appeal (*Simler* v. *Wilson, et al.*, 210 F.2d 99) in which, among others, they asserted that the opinion was erroneous and wrong because the court failed to give consideration to the exception in the prohibition of the Oklahoma Constitution which permits a corporation to take, acquire, hold or own real estate outside of cities and towns or additions thereto "if it is reasonably necessary and proper for carrying on the business for which the corporation was chartered or licensed. *This exception in-*

volves a question of fact to be determined upon a trial of the issue."

When the petition for rehearing was denied, the executor and Sisters filed a petition for a writ of certiorari in this Court (No. 677, October Term, 1953) in which they asserted, among others (pp. 8-9, Petition for a Writ of Certiorari in No. 677, October Term, 1953):

> "The Court (of Appeals) erred in failing to give consideration to the exception contained in Article XXII, Section 2 of the Oklahoma Constitution, also carried in Section 1.20 of the Business Corporation Act, to-wit: That a corporation may take, acquire, hold or own real estate outside of cities and towns if it be reasonably necessary and proper for carrying on the business for which the corporation was chartered or licensed. This exception involves a question of fact to be determined upon a trial of the merits."

This contention was argued at length in the original brief attached to the petition for a writ of certiorari (pp. 18-21).

The petition for a writ of certiorari was denied by this Court on April 26, 1954 (347 U.S. 954).

A petition for rehearing and motion to stay proceedings were then filed by the executor and Sisters, which were denied by this Court on May 24, 1954 (347 U.S. 973).

On June 14, 1954, the District Court entered judgment (p. xxiv, Appendix A, Petitioners' Petition for a Writ of Certiorari) based upon the opinion, judgment and mandate of the Court of Appeals on the first appeal (*Simler* v. *Wilson, et al.*, 210 F.2d 99, pp. 29-38, Print of Record in No. 677, October Term, 1953).

The appeal by the executor and Sisters from this judgment was dismissed by the Court of Appeals on October 12, 1954 (p. xxv, Appendix A, Petitioners' Petition for a Writ of Certiorari), for the obvious reason that the judgment appealed from had been entered in conformity to the mandate of the Court of Appeals on the first appeal, and the second appeal was without merit.

At the hearing on distribution of the estate in the County Court, the only testimony offered by Sisters was that the corporation would use the income from the oil producing farm to help maintain existing or added facilities to its hospitals and convents (p. xli, Appendix A, Petitioners' Petition for a Writ of Certiorari), and the County Court found and held that the real estate was not necessary or proper for which the corporation was formed, and Simler is entitled to the farm and oil runs (p. xliv, Appendix A, Petitioners' Petition for a Writ of Certiorari).

The executor did not appeal from judgment of the County Court, distributing the farm to Simler. The issue to him is closed. Clearly, the executor has no interest in the subject-matter of this litigation which entitles him to petition for certiorari, since, in his official capacity his only duty is to distribute the property to the persons found entitled thereto. *In re Lee's Estate*, 206 Okla. 275, 243 P.2d 1013; *Love* v. *Wilson*, 181 Okla. 558, 75 P.2d 876.

There is no special or important reason shown in the petition for the granting of a writ of certiorari as required by Rule 19 of this Court, and it is submitted that this is an appropriate case for this Court to adjudge to respondent

reasonable damages for his delay, under Rule 56(4) of the Rules of this Court.

Respectfully submitted,

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Attorneys for Respondent.

January, 1955.

APPENDIX I

Affidavit in Support of Motion to Dismiss

State of Oklahoma)
) ss.
Oklahoma County)

Fred E. Suits, being first duly sworn, desposes and says

I am attorney for the defendants herein, and have personal knowledge of the facts herein set forth.

This affidavit is submitted is support of the defendants motion to dismiss the complaint herein, for the purpose of showing that there is in this action no genuine issue as to any material fact, and that the defendants are entitled to judgment as a matter of law.

1

Affiant shows to the court that the Plaintiff filed in the county court of Oklahoma County, Oklahoma, Objections to the Probate of the Last Will and Testament of Birdine Fletcher, and upon a hearing being had, said Objections were denied, and the will was admitted to probate.

A certified copy of said Objections of Admissions of Will to Probate, and Amendment of Objections, and Order Admitting Will to Probate, are attached hereto, marked Exhibits "A" "B" and "C" respectively, and made a part hereof.

2

Affiant further shows to the court that the Plaintiff gave written Notice of Appeal to the District Court of Oklahoma County, Oklahoma, where said case is now awaiting trial *de novo* upon questions of law and fact, and mixed questions of law and fact.

A certified copy of said Notice of Appeal is hereto attached marked Exhibit "D" and made a part hereof.

Affiant further shows to the court that the Sisters of St. Francis, a Missouri Corporation, has domesticated in the state of Oklahoma and duly qualified to transact business under the laws of said state; that its last Amended Articles of Association was adopted September 28, 1938, and is now on file with the Secretary of State of the State of Oklahoma.

A copy of said Amended Articles is hereto attached, marked Exhibit "E", and made a part hereof.

/s/ Fred E. Suits

Subscribed and sworn to before me this 5th day of November, 1952.

Creed T. Huddleston
Notary Public

My Commission Expires
June 11, 1956